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मध्य प्रदेश उच्च न्यायालय, जबलपुर - 482 007

JUDICIAL OFFICERS' TRAINING & RESEARCH INSTITUTE

HIGH COURT OF MADHYA PRADESH, JABALPUR - 482 007

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PART-IV

IMPORTANT CENTRAL/STATE ACTS & AMENDMENTS

1. The Criminal Law Amendment Act, 2013 19

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FROM EDITOR'S' DESK

C.V. SIRPURKAR
Director, JOTRI

Esteemed Readers,

Docket explosion in recent years has been a cause of worry in India. On a conservative estimate more than 3 crore cases have been pending before various Courts. The situation is akin to that which prevailed in United States of America in late seventies and early eighties. That is when the U.S.A. took to alternative dispute resolution, particularly mediation, in a big way. Today, almost 90 % of disputes in that country are resolved through the instrumentality of mediation. However, that is just one part of the story. Apart from being a potent tool for reducing pendency, mediation is also a low cost alternative to expensive litigation. The parties to a mediation settlement have power to control the result; therefore, the outcome does not remain unpredictable. It does not create a winner and a loser because the result is mutually acceptable. Most of all, it creates a congenial atmosphere in the society which is a precondition for progress of the nation. Thus, there can be no doubt that resort to alternative dispute resolution processes is necessary to give speedy and effective relief to the litigants; to reduce the pendency in and burden upon the courts and to promote harmony in society.

In India mediation along with Lok Adalats, are preferred modes of Alternative Dispute Resolution. Lok Adalats are already flourishing in the State of Madhya Pradesh. However, so far as mediation is concerned, there is still need to spread the message across even amongst judicial fraternity. It is felt that the Judges are still shy of referring the cases to mediation. As a result, referrals are infrequent. It could have been due to clumsy drafting of S. 89 of the Code of Civil Procedure, leading to confusion regarding exact role of referral Judge and scope of mediation process. It may, to some extent, also be due to lack of awareness amongst the District Judiciary regarding the potentialities of mediation. So far as interpretation of S.89 is concerned, air has been cleared by the Apex Court in the case of ***Afcons Infrastructure Ltd. & Anr. Vs Cherian***

Varkey Construction Co. P Ltd. & Ors., 2010 8 SCC 24. A detailed article on the subject may be found elsewhere in the issue

Now, only the need of initiating the judicial fraternity into the process of mediation remains to be fully addressed. Though, numerous programmes on mediation including 40 hours training programmes for mediators, have already been conducted across the State, there is still a lot of scope for motivating select audience towards mediation. In this backdrop, on inspiration of Hon'ble the Chief Justice of Madhya Pradesh, the State Legal Services Authority and the Judicial Officers' Training and Research Institute have collaborated to organize a series of programmes on mediation at Indore, Gwalior, Jabalpur and Morena. In all, 19 programmes are to be held. Out of these, 11 shall be organized under the aegis of SALSA and remaining 8 under the aegis of JOTRI. All the programmes shall be addressed by Dr. Sheo Kumar Sharma, who is an acknowledged authority in the field of mediation. One programme each has been designed exclusively for sitting High Court Judges and Registry Officers, retired High Court Judges/District Judges and Advocates, serving Judicial Officers, members of local chapter of Chamber of Commerce, representatives of Non-Government Organizations and law students.

It is expected that this elaborate exercise will succeed in motivating the Judges in referring larger number of cases to mediation. It is also expected that the lawyers would be motivated to join increasing ranks of trained mediators. The litigants are expected to respond to efforts of mediation in a positive frame of mind, so that more and more cases are resolved through the process of mediation, leaving the Courts free to concentrate upon and adjudicate the complex cases reflecting intractable disputes in traditional manner. It is sincerely hoped that ultimately we would be able to accomplish our constitutional goal of speedy, effective and inexpensive justice for all.

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APOINTMENT OF ADDITIONAL JUDGES IN HIGH COURT OF MADHYA PRADESH

Hon'ble Shri Justice Subhash Raosaheb Kakade, Hon'ble Shri Justice Bhagwan Das Rathi, Hon'ble Shri Justice Mahendra Kumar Mudgal and Hon'ble Shri Justice Dharmdhwaj Kumar Paliwal have been administered the oath of office by Hon'ble Shri Justice Sharad Arvind Bobde, Chief Justice, High Court of Madhya Pradesh on 1st April, 2013 as Additional Judges of High Court of Madhya Pradesh in a Swearing-in-Ceremony held in the Conference Hall of South Block of High Court at Jabalpur.

Hon'ble Shri Justice Subhash Raosaheb Kakade has been appointed as Additional Judge of the High Court of Madhya Pradesh. Born on 23rd January, 1955 at Dewas. After obtaining degrees of B.A. LL.B., joined Judicial Services as Civil Judge Class II on 29th October, 1979 at Shajapur. Confirmed as Civil Judge in the year 1983 and appointed as CJM in the year 1991. Was posted as officiating District Judge in Higher Judicial Services in the year 1992.

Worked as Registrar S.A.T., Bhopal in the year 1997. Confirmed as District Judge in Higher Judicial Services in the year 1997. Was granted Selection Grade Scale w.e.f. 08.05.1999. Worked in different capacities as Special Judge SC/ST (P.A.) Act, Tikamgarh in the year 2003, District and Sessions Judge, Neemuch and thereafter at Guna and Bhopal. Also worked as Registrar, High Court of M.P., Bench at Indore in the year

2006. Was granted Super Time Scale w.e.f. 19.05.2006. Was Registrar General, High Court of M.P. from 03.01.2011 till elevation.

Took oath as Additional Judge, High Court of Madhya Pradesh on 01.04.2013.

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Hon'ble Shri Justice Bhagwan Das Rathi has been appointed as Additional Judge of the High Court of Madhya Pradesh. Born on 16th September, 1953. After completing B.SC., LL.B., was enrolled as an Advocate in the year 1978 and started practicing in Civil and Criminal sides in High Court and Lower Courts at Indore. Joined Judicial Services on 04.09.1979. Confirmed as Civil Judge in the year 1983. Appointed as C.J.M. in the year 1991. Was Additional Director Judicial Officers' Training Institute, Jabalpur from August, 1994 to April 1996. Prepared a guide for smooth operation of laptop based on Linux System which was published by the High of M.P. from, August 1994 to April 1996. Confirmed as District Judge in Higher Judicial Services in the year 1997. Was granted Selection Grade Scale w.e.f. 08.05.1999. Posted as Special Judge for cases under SC/ST (P.A.) Act and N.D.P.S. Act in the year 2000. Was granted Super Time Scale w.e.f. 19.10.2006. Was posted as Principal Registrar, High Court of M.P., Bench Gwalior from 01.09.2009 till elevation.

Took oath as Additional Judge, High Court of Madhya Pradesh on 01.04.2013.

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Hon'ble Shri Justice Mahendra Kumar Mudgal was appointed as Additional Judge of the High Court of Madhya Pradesh. Born on 28th August, 1954 at Gohadi, Tahsil Gohad, District Bhind. Completed primary education in village Gohadi. After obtaining LL.B. Degree from Jiwaji University Gwalior, started practice in the year 1976. Joined Judicial Services on 16.11.1981. Confirmed as Civil Judge in the year 1985. Appointed as C.J.M. in the year 1991. Confirmed as District Judge in Higher Judicial Services in the year 1997. Was granted Selection Grade Scale w.e.f. 04.06.1999. Worked in different capacities as Special Judge SC/ST (P.A.) Act and N.D.P.S. Act, at Chhatarpur and Sheopur respectively and as District and Sessions Judge, Indore from May 2010 to March 2012. Also worked as Dy. Secretary, Law Department, Bhopal in the year 1999 and as Additional Secretary in the year 2001. Was granted Super Time Scale w.e.f. 10.10.2007. Also worked as Principal Registrar (Exam & Training) at High Court of M.P., Jabalpur in the year 2008 and continued upto May 2010 and as Principal Registrar (Inspection & Vigilance) at High Court of M.P., Jabalpur from 15.03.2012 till elevation.

Took oath as Additional Judge, High Court of Madhya Pradesh on 01.04.2013.

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Hon'ble Shri Justice Dharmdhwaj Kumar Paliwal was appointed as Additional Judge of the High Court of Madhya Pradesh. Born on 16th March, 1955 in Hamirpur, Uttar Pradesh. After completing B.Sc., LL.M., joined Judicial Services on 05.11.1981. Confirmed as Civil Judge in the year 1985. Appointed as A.C.J.M. in the year 1991 and as C.J.M. in the year 1992. Confirmed as District Judge in Higher Judicial Services in the year 1997. Was granted Selection Grade Scale w.e.f. 04.06.1999. Worked in different capacities as President, District Consumer Forum, Rewa in the Year 2001, as Additional Secretary M.P. Law and Legislative Affairs Department, Bhopal, as Legal Remembrancer and Secretary (Law), Law Department, Bhopal, in the year 2004, as District and Sessions Judge, Bhind in the year 2005 and Shivpuri in the 2008, as District Judge (Inspection & Vigilance), High Court of M.P. at Bench Gwalior in year 2009. Was granted Super Time Scale w.e.f. 10.10.2007. Posted as District and Sessions Judge, Gwalior from 01.06.2010 till elevation

Took oath as Additional Judge, High Court of Madhya Pradesh on 01.04.2013.

We on behalf of JOTI Journal wish Their Lordships a very happy and successful tenure.

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PART - I

ISSUES AND CHALLENGES RELATING TO DISPOSAL OF IN-TERIM APPLICATION IN CIVIL TRIALS

Hon'ble Shri Justice Alok Aradhe,
Judge, High Court of M.P.

The Code of Civil Procedure, 1908 contains the law relating to procedure in suit and civil proceeding. The Code has been amended from time to time by various Acts of Central and State Legislature. The Code has undergone two major amendments i.e. in the year 1976 and in the year 2002. The object of extensive amendments in the Code in the year 1976 was to minimize the litigation and to give the litigant a fair trial in accordance with the accepted principles of natural Justice and to expedite the disposal of civil suits and proceedings so that the justice is not delayed. Similarly the object of Amendment Act, 2002 was to introduce the provisions in the Code with a view to cut short the delay in disposal of civil suits at various levels. The Code was amended by the Code of Civil Procedure Amendment Act, 2002 to reduce the delay in disposal of civil cases and its provisions were amended with demands of fair play and justice. In many provisions of the Code, a judge has been given the discretion i.e. the power to act in a particular way according to the special circumstances of the case. The procedure is something designed to facilitate the justice and further it ends, and is not a penal enactment for punishing the erring parties. In ***Sangram Singh v. Election Tribunal, AIR 1955 SC 425,*** the Supreme Court has held that our laws of procedure are grounded on principle of natural justice. The Code of Civil Procedure is a general enactment, dealing with procedural aspects.

In ***S.N. Mukherjee v. Union of India, 1990 4 SCC 594=AIR 1990 SC 1984*** the Supreme Court has held that people must have confidence in the judicial or quasi Judicial authorities. While emphasizing the need for assigning reasons, it was held that giving of reasons minimizes the chances of arbitrariness and hence, it is an essential requirement of the rule of law. In ***Secertary and Curator, Victoria Memorial Hall v. Howrah Ganatantik Nagrik Samity and Others, 2010 3 SCC 732=AIR 2010 SC 1285,*** it has been held by the Supreme Court in paragraphs 40 & 41 as under :-

> s"40. It is settled legal proposition that not only an administrative but also a judicial order must be supported by reasons, recorded in it. Thus, while deciding an issue, the court is bound to give reasons for its conclusion. It is the duty and obligation on the part of the court to record reasons while disposing of the case. The hallmark of an order and exercise of judicial power by a judicial forum is to disclose its reasons by itself and giving of reasons has always been insisted upon as one of the fundamentals of sound administration of justice delivery system, to make

known that there had been proper and due application of mind to the issue before the Court and also as an essential requisite of the principles of natural justice. “The giving of reasons for a decision is an essential attribute of judicial and judicious disposal of a matter before courts, and which is the only indication to know about the manner and quality of exercise undertaken, as also the fact that the court concerned had really applied its mind.” Vide ***State of Orissa v. Dhaniram Luhar, AIR 2004 SC 1794 and State of Rajasthan v. Sohan Lal, AIR 2004 S C 1794*** .

41. Reason is the heart beat of every conclusion. It introduces clarity in an order and without the same it becomes lifeless. Reasons substitute subjectivity by objectivity. Absence of reasons renders the order indefensible/unsustainable particularly when the order is subject to further challenge before a higher forum.”

A. Section 10 C.P.C.

i Section 10 C.P.C. deals with the stay of suit which provides that no Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties or between the parties under whom they or any of them claim litigating under the same title. The object of Section 10 is to prevent the Courts of concurrent jurisdiction from simultaneously trying two parallel suits in respect of the same matter in issue, to avoid two parallel trials on the same issue by two Courts and to avoid recording conflicting findings on issues which are directly and substantially in issue in previously instituted suit.

ii In the case of ***Aspi Jal and another v. Khushroo Rustom Dadyburjor, 2013 4 SCC 333 = AIR 2013 SC 1712*** relying on ***National Institute of Mental Health & Neuro Sciences v. C. Parameshwara 20052SCC256=AIR 2005 SC 242,*** it has been held that the test of applicability of Section 10 is whether on a final decision being reached in the previously instituted suit, such decision would operate as res judicata in the subsequent suit. The subject matter of both the suits should be same.

iii In ***M.S. Sheriff and another v. State of Madras and others, AIR 1954 SC 397,*** the question which arose for consideration before the Supreme Court was whether during the pendency of the criminal proceedings the civil proceedings should also be continued? The Constitution Bench of the Supreme Court held that as between the civil and criminal proceedings, the criminal matter should be given the precedence. However, a word of caution was added that no hard and fast rule can be laid down.

iv In the case of ***Nemi Chand v. Harish Kumar, 2000 3 MPLJ 53,*** our High Court while placing reliance on a decision of Supreme Court in ***State of Rajasthan v. M/s. Kalyan Sundram Cement Industries Ltd., 1996 II MPWN Short Note 61,*** has held that a suit for recovery of amount covered under the dishonoured cheques

should not be stayed solely on the ground that a complaint under section 138 of Negotiable Instruments Act in respect of dishonoured cheque was pending. Thus, it is apparent that the question of staying the proceedings of a suit has to be decided on the facts of each case.

B. Section 11 C.P.C.

i Section 11 incorporates the principle of res judicata. In ***Gurubux Singh v. Bhooralal, AIR 1964 SC 1810,*** it has been held that plea of res judicata cannot be raised or decided in the absence of the plea, copy of the judgment and decree in the previous suit. The question of res judicata can be adjudicated only when the pleading in the previous suit as well as copy of judgment and decree is on record.

ii In the case of ***Pandurang Mahadeo Kavade v. Annaji Balwant Bokli and others, AIR 1971 SC 2228,*** it has been held that if the previous decision has been rendered by the Court not having the pecuniary jurisdiction, the same does not operate as res judicata.

iii Similarly in ***Richpal Singh and others v. Dalip, AIR 1987 SC 2205*** it has been held that finding rendered by a Court which had no jurisdiction to give such a finding, the same does not operate as res judicata in subsequent proceeding.

iv In the case of ***Prahlad Singh v. Col. Sukhdev Singh, AIR 1987 SC 1145*** the Supreme Court has held that interlocutory decisions given by a Court at earlier stage is binding on the subsequent stage of the suit.

v In ***Brahma Vart Sanatan Dharm Maha-mandal v. Kanhaiya Lal Bagla and others, 2001 9 SCC 562 = AIR 2001 SC 3799*** it has been held that principle of res judicata in respect of any question in a latter suit would not apply if it was not necessary to be decided.

vi In ***Bishwanath Prasad Singh v. Rajendra Prasad and another, 2006 4 SCC 432 = AIR 2006 SC 2965*** it has been held that in order to attract the applicability of doctrine of res judicata the issue has to be heard and finally decided.

vii In ***Alka Gupta v. Narendra Kumar Gupta, 2010 10 SCC 141 = AIR 2011 SC 9*** it has been held that in order to attract the applicability of Section 11 of the Code, the following conditions have to be fulfilled :-

a The matter must be directly and substantially in issue in the former suit and in the latter suit.

b The prior suit should be between the same parties or persons claiming under them.

c Parties should have litigated under the same title in the earlier suit.

d The matter in issue in the subsequent suit must have been heard and finally decided in the first suit.

e The Court trying the former suit must have been competent to try the particular issue in question.

viii In the case of ***M. Nagabhushana v. State of Karnataka and others, 2011 3 SCC 408 = AIR 2011 SC 1113*** it has been held that the principles of res judicata are of universal application as they are based on age old principles, namely, it is in the interest of the State that there should be an end to the litigation and the other principle is that no one ought to be vexed twice in litigation for the same cause. The principle of finality of litigation i.e. res judicata is based on high principle of public policy. The plea of res judicata is not a technical doctrine but a fundamental principle which sustains the rule of law in ensuring finality in litigation.

C. Section 34 C.P.C.

i Section 34 of the Code deals with the power of the Court to grant interest. In ***Central Bank of India v. Ravindra and others, 2002 1 SCC 367 = AIR 2001 SC 3095*** it has been held that discretion to grant interest has to be exercised judicially and for the reasons which are recorded and not in an arbitrary manner. In case where the component of interest of the principle sum adjudged is disproportionate to the sum actually advanced, the relief of pendent lite and future interest can be refused.

D. Section 35 C.P.C.

i Section 35 of the Code deals with power of the Court to award cost. In ***Salem Advocate Bar Association, T.N. v. Union of India, 2005 6 SCC 344 = AIR 2005 S C 3353*** the Supreme Court deprecated the general practice to direct the parties to bear their own costs and it has been held that cost has to be actual and reasonable cost.

ii In the case of ***Vinod Seth v. Devinder Bajaj and another, 2010 8 SCC 1*** it was held that the provisions of imposition of cost is intended to achieve the following objects.

> "a It should act as a deterrent to vexatious, frivolous and speculative litigations or defences. The spectre of being made liable to pay actual costs should be such, as to make every litigant think twice before putting forth a vexatious, frivolous or speculative claim or defence.
>
> b Costs should ensure that the provisions of the Code, the Evidence Act and other laws governing procedure are scrupulously and strictly complied with and that parties do not adopt delaying tactics or mislead the Court.
>
> c Costs should provide adequate indemnity to the successful litigant for the expenditure incurred by him for the litigation. This necessitates the award of actual costs of litigation as contrasted from nominal or fixed or unrealistic costs.

d The provision for costs should be an incentive for each litigant to adopt alternative dispute resolution ADR processes and arrived at a settlement before the trial commences in most of the cases. In many other jurisdictions, in view of the existence of appropriate and adequate provisions for costs, the litigants are persuaded to settle nearly 90% of the civil suits before they come up to trial.

e The provisions relating to costs should not however obstruct access to courts and justice. Under no circumstances the costs should be a deterrent, to a citizen with a genuine or bona fide claim, or to any person belonging to the weaker sections whose rights have been affected from approaching the courts".

At present these goals are sought to be achieved mainly by Sections 35, 35-A and 35-B read with the relevant civil rules of practice relating to taxing of costs."

E. Section 80 C.P.C.

i Section 80 of the Code provides a notice to be issued to the government in the manner prescribed therein before institution of the suit.

ii In ***Bishandayal and Sons v. State of Orissa and others, 2001 1 SCC 555= AIR 2001 SC 544*** it has been held that government can waive the requirement of notice prescribed under section 80 of the Code. However, the question of wavier has to be decided in the facts of each case. It has been further held that when an amended plaint is based on completely new cause of action, fresh notice under section 80 of the Code would be required to be given.

iii In ***Salem Advocate Bar Association, T.N. v. Union of India, 2005 6 SCC 344*** the Supreme Court has dealt with the object of giving two months notice and directed the governments to nominate the officers to ensure that proper replies to such notices are sent and in any default the Court can award heavy costs.

F. Order 1 Rule 10 C.P.C.

i Order 1 Rule 10 C.P.C. deals with the impleadment of parties. Ordinarily plaintiff is dominus litus but Order 1 Rule 10 2 empowers the Court to direct the parties to implead a person either as a plaintiff or a defendant whose presence before the Code is necessary in order to enable the Court to effectually and completely adjudicate the controversy involved in the suit.

In ***Razia Begum v. Sahebzadi Anwar Begum, AIR 1958 SC 886*** it has been held that the question of addition of the parties under R.10 O.1 of the Code of Civil Procedure is generally not one of initial jurisdiction of the Court, but of a judicial discretion which has to be exercised in view of all the facts and circumstances of a particular case.

ii In ***Ramesh Hirachand Kundanmal v. Municipal Corporation of Greater Bombay and others, 1992 2 SCC 524,*** it has been held that where a person is directly and vitally interested in the subject-matter of the suit and would be affected by the result of the litigation, his impleadment should be directed.

iii In the case of ***Savitri Devi v. District Judge, Gorakhpur and others, 1999 2 SCC 577*** while considering the provisions of Order 1 Rules 102 of the Code, the Supreme Court has held that object of the Rule is to avoid multiplicity of litigation.

iv In ***Mumbai International Airport Private Limited v. Regency Convention Centre and Hotels Private Limited and others, 2010 7 SCC 417 = AIR 2010 SC 3109*** it has been held that discretion of the Court to add parties is an exception to the general rule in regard to the impleadment of the parties. The discretion is limited to person found to be necessary or proper party. However, the discretion is judicial and has to be exercised according to the reason, fair play and not according to the whims and caprice.

v In ***Thomson press India Limited v. Nanak Builders and Investors Private Limited and others, 2013 5 SCC 397,*** pointing out distinction between necessary and proper party, it has been held in paragraph 32 as under :-

> "32. Considering the aforeasaid provision, this Court in ***Ramesh Hirachand Kundanmal v. Municipal Corporation of Greater Bombay*** supra held as under : SCC p. 531, para 14

"14. It cannot be said that the main object of the rule is to prevent multiplicity of actions though it may incidentally have that effect. But that appears to be a desirable consequence of the rule rather than its main objective. The person to be joined must be one whose presence is necessary as a party. What makes a person a necessary party is not merely that he has relevant evidence to give on some of the questions involved; that would only make him a necessary witness. It is not merely that he has an interest in the correct solution of some question involved and has thought of relevant arguments to advance. The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party. The line has been drawn on a wider construction of the rule between the direct interest or the legal interest and commercial interest. It is, therefore, necessary that the person must be directly or legally interested in the action in the answer i.e. he can say that the litigation may lead to a result which will affect him legally that is by curtailing his legal rights. It is difficult to say that the rule contemplates joining as a defendant a person whose only object is to prosecute his own cause of action. Similar provision was considered in ***Amon v. Raphael Tuck & Sons Ltd.,*** wherein after quoting the observations of Wynn-Parry, J. in ***Dollfus Mieg et Compagnie SA v. Bank of England,*** that the true test lies not so much in an analysis of what are the constituents of the applicants' rights, but rather in what would be the result on the subject-matter of the action if those rights could be established, Devlin, J. has stated: Amon case, QB p. 371

'... the test is: "May the order for which the plaintiff is asking directly affect the intervener in the enjoyment of his legal rights?"'"

G. Order 2 Rule 2 C.P.C.

i In the case of ***Alka Gupta v. Narendra Kumar Gupta, 2010 10 SCC 1414*** it has been held as under :-

> "The object of Order 2 Rule 2 of the Code is twofold. First is to ensure that no defendant is sued and vexed twice in regard to the same cause of action. Second is to prevent a plaintiff from splitting of claims and remedies based on the same cause of action. The effect of Order 2 Rule 2 of the Code is to bar a plaintiff who had earlier claimed certain remedies in regard to a cause of action, from filing a second suit in regard to other reliefs based on the same cause of action. Is does not however bar a second suit based on a different and distinct cause of action.
>
> 13. This Court in ***Gurubux Singh v.. Bhooralal*** supra p. 1812, para 6] held :
>
> "6. In order that a plea of a bar under Order 2 Rule 2 3 of the Civil Procedure Code should succeed the defendant who raises the plea must make out: 1 that the second suit was in respect of the same cause of action as that on which the previous suit was based; 2 that in respect of that cause of action, the plaintiff was entitled to more than one relief; 3 that being thus entitled to more than one relief the plaintiff, without leave obtained from the court omitted to sue for the relief for which the second suit had been filed. From this analysis it would be seen that the defendant would have to establish primarily and to start with, the precise cause of action upon which the previous suit was filed, for unless there is identity between the cause of action on which the earlier suit was filed and that on which the claim in the later suit is based, there would be no scope for the application of the bar."
>
> Unless the defendant pleads the bar under Order 2 Rule 2 of the Code and an issue is framed focusing the parties on that bar to the suit, obviously the court cannot examine or reject a suit on that ground. The pleadings in the earlier suit should be exhibited or marked by consent or at least admitted by both parties. The plaintiff should have an opportunity to explain or demonstrate that the second suit was based on a different cause of action."

H. Order 6 Rule 17 C.P.C.

i Order 6 Rule 17 of the Code deals with amendment of pleadings. In the case of ***Rajkumar Gurawra v. M/s. S.K. Sarwagi & Co. Pvt. Ltd. & another, AIR 2008 SC 2303,*** the Supreme Court while interpreting the provision as substituted by Amendment Act, 2002 has held that pre-trial amendments are to be allowed liberally than those sought to be made after commencement of the trial.

ii In ***Chander Kanta Bansal v. Rajender Singh Anand, 2008 5 SCC 117 = AIR 2008 SC 2234*** the Supreme Court has considered the expression "due diligence" and has held that due diligence means such diligence as a prudent man would exercise in conduct of his own affairs. It has further been held that the entire object of the amendment to Order 6 Rule 17 of the Code as introduced in 2002, is to stall filing of applications for amending a pleading subsequent to the commencement of trial, to avoid surprises and that the parties had sufficient knowledge of the other's case. A delayed amendment which appears to be based on after thought can be disallowed. However, in a proper case, the Court can allow delayed amendment by compensating the other side by awarding cost.

iii In the case of ***J. Samuel and others v. Gattu Mahesh and others, 2012 2 SCC 300*** it has been held in paragraphs 18 and 19 as under :-

> "18. The primary aim of the court is to try the case on merits and ensure that the rule of justice prevails. For this the need is for the true facts of the case to be placed before the court so that the court has access to all the relevant information in coming to its decision. Therefore, at times it is required to permit parties to amend their plaints. The court's discretion to grant permission for a party to amend his pleading lies on two conditions, firstly no injustice must be done to the other side and secondly, the amendment must be necessary for the purpose of determining the real question in controversy between the parties. However, to balance the interest of the parties in pursuit of doing justice, the proviso has been added which clearly states that:
>
> > ". ..... no application for amendment shall be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of the diligence, the party could not have raised the matter before the commencement of trial."
>
> 19. Due diligence is the idea that reasonable investigation is necessary before certain kinds of relief are requested. Duly diligent efforts are a requirement for a party seeking to use the adjudicatory mechanism to attain an anticipated relief. An advocate representing someone must engage in due diligence to determine that the representations made

> are factually accurate and sufficient. The term "due diligence" is specifically used in the Code so as to provide a test for determining whether to exercise the discretion in situations of requested amendment after the commencement of trial."

iv In the case of ***State of Madhya Pradesh v. Union of India and another, 2011 12 SCC 268 = AIR 2012 SC 2518*** it has been held as under :-

> "8. The purpose and object of Order 6 Rule 17 of the Code is to allow either party to alter or amend his pleadings in such manner and on such terms as may be just. Amendment cannot be claimed as a matter of right and under all circumstances, but the courts while deciding such prayers should not adopt a hyper-technical approach. Liberal approach should be the general rule, particularly in cases where the other side can be compensated with costs. Normally, amendments are allowed in the pleadings to avoid multiplicity of litigations."

v In ***Usha Devi v. Rijwan Ahamad and other, 2008 3 SCC 717 = AIR 2008 SC 1147*** it has been held that power under 6 Rule 17 CPC has to be exercised in the interest of Justice and merit of the amendment is not relevant consideration for allowing the prayer for amendment.

vi In the case of ***Surender Kumar Sharma v. Makhan Singh, 2009 10 SCC 626 = AIR 2009 SC Supp 2671*** it has been held that an application for amendment is not liable to be rejected on the ground of delay alone, if the Court finds that by allowing the application the real controversy between the parties may be resolved and the other party can be compensated in terms of cost. However, the Court has to examine whether by the proposed amendment, the nature and character of the suit would change or not.

vii In ***South Konkan Distilleries and another v. Prabhakar Gajanan Naik and others, 2008 14 SCC 632 = AIR 2009 S C 1177*** the Supreme Court was dealing with the question with regard to claim made in the application for amendment which is within the limitation. It has been held that if the claim made in the application for amendment is within limitation, same should be liberally allowed or there would be an arguable case with regard to point of limitation and then in such a case also, the application for amendment should be allowed. However, if the claim in the application for amendment is barred by limitation such an application has to be rejected and in case the question of limitation is arguable, the application should be allowed and issue should be framed with regard to limitation.

viii In ***Vimal Chand Ghevarchand Jain and others v. Ramakant Eknath Jadoo 2009 5 SCC 713 = AIR 2009 SC Supp 1550*** it has been held that the defendant is entitled to raise alternative and inconsistent pleas but not the pleas which are mutually destructive of each other.

ix In ***B.K. Narayana Pillai v. Parameshwaran Pillai and another, 2000 1 SCC 712*** it has been held that withdrawal of admission by way of amendment is not permissible.

x In ***Ramesh Kumar Agarwal v. Rajmala Exports Private Limited and others 2012 5 SCC 337*** it has been held that the Court should adopt liberal approach in allowing amendment. The amendment seeking to introduce the facts in support of contention already pleaded is permissible.

I. Order 7 Rule 11 C.P.C.

i Order 7 Rule 11 of the Code empowers the Court to reject the plaint. In ***Saleem Bhai and others v. State of Maharashtra and others, 2003 1 SCC 557*** the Supreme Court while dealing with the scope and ambit of power of the Court under Order 7 Rule 11 CPC, has held that the relevant facts for deciding the application under Order 7 Rule 11 of the Code are the averments in the plaint and not the pleas taken in the written statement and if on perusal of the plaint the Court finds that the suit is not maintainable on any of the grounds mentioned under Order 7 Rule 11 CPC, the power to reject the plaint can be exercised at any stage of the suit and before conclusion of the trial.

J. Order 8 Rule 1 C.P.C.

In ***Kailash v. Nankhu and others, 2005 4 SCC 480 = AIR 2005 SC 2441*** while interpreting the provisions of Order 8 Rule 1 and the proviso appended to it, it was held that the said provision is directory in nature and is not mandatory, though the provisions of Order 8 Rule 1 cast an obligation on the defendant to file written statement within time prescribed therein. The provision does not specifically take away the power of the Court to take written statement on record though filed beyond the time as provided therein. The Supreme Court has laid down the guidelines for exercising the discretion of the Court to take the written statement on record which is filed beyond the time prescribed therein. It has been held that prayer for seeking time beyond 90 days for filing written statement has to be made in writing and the Court can put the defendant on terms including imposition of compensatory cost and can insist for documentary evidence being annexed with the application seeking extension of time so as to satisfy the Court that the prayer was founded on grounds which then existed. It has further been held that laws of procedure have to be construed in manner which would not leave the court helpless to meet extraordinary situations in the ends of justice.

K. Order 14 Rule 5 C.P.C.

i In ***M/s. Ramdayal Umraomal v. M/s. Pannalal Jagannathji, AIR 1979 MP 153 FB*** it has been held that the issue relating to jurisdiction can be tried as a preliminary issue only if it can be disposed of without recording any evidence. where the issue of jurisdiction is a mixed question of law and fact requires recording of evidence the same cannot be tried as preliminary issue.

L. Order 17 Rules 2 & 3 C.P.C.

i In ***Rama Rao vs. Shantibai, AIR 1977 MP 222,*** in paragraph 23 it has been held as under :-

Question	Answers
1 If, when a suit is called on for hearing, a party's counsel appears and seeks adjournment but when adjournment is refused, he retires saying that he has no instructions whether this will amount to "appearance" of the party whom the counsel represents.	
aIf the counsel had sought adjournment because he was instructed by his client to ask for an adjournment only, and not to proceed with the trial if adjournment be refused?	It will be no appearance of the party and R.2 of O.17 C.P.C. alone would be attracted. However, in such a case the defaulting party must show 'sufficient cause' for non-appearance as well as for not fully instructing the counsel.
b If the counsel feels a necessity to seek adjournment so that he may prepare himself and, on his own, seeks adjournment.	It will be no appearance of the party and R.2 of O. 17 C.P.C. alone would be attracted.
2 If, when a case is called on for hearing, the counsel appears without making any request for adjournment merely to inform the Court that he has no instructions and, therefore, would not appear, will it still amount to appearance of a counsel for the purposes of O.9 R. 8 or O.17 R.2 C.P.C.?	It will be no appearance of the party and R.2 of O.17 C.P.C. alone would be attracted.
3 whether an application under O.9 C.P.C. will lie for setting aside the dismissal of a suit in the following circumstances :-	
a The plaintiff had not been asked to do something and he did not appear when the case was called out on for hearing.	Yes Order 17 R.2 C.P.C. would alone be attracted.
b The plaintiff was asked to do something which he did not do, nor did he appear when the case was called on for hearing.	Yes Order 17 Rule 2 C.P.C. would alone be attracted.
4 Whether, in the following situations, the defendant can apply under O.9 R.13 C.P.C. for setting aside an ex parte decree :-	

Question	Answers
a When the defendant had not been asked to do something and he did not appear and the Court decided the suit on the basis of the existing material without or after taking any further evidence on record.	Yes Order 17 Rule 2 C.P.C. would alone be attracted.
b When the defendant had been asked to do something which he did not do, nor appeared when the case was called on for hearing and the Court decided the suit on the existing material without taking any further evidence for the plaintiff.	Yes Order 17 Rule 2 C.P.C. would alone be attracted.
c When he had been asked to do something which he did not do and did not appear when the case was called on for hearing and, therefore, on the same day, the Court took on record ex parte evidence produced by the plaintiff.	Yes Order 17 Rule 2 C.P.C. would alone be attracted.
d When he had been asked to do something which he did not do, nor appeared when the case was called on for hearing and the trial Court adjourned the hearing for recording plaintiff's evidence ex parte and on the next date, after recording plaintiff's ex parte evidence, passed an ex parte decree against him.	Yes Order 17 Rule 2 C.P.C. would alone be attracted.

M. Order 22 Rule 9 C.P.C.

i In ***Balwant Singh Dead v. Jagdish Singh and others, 2010 8 SCC 685*** = ***AIR 2010 S C 3043*** in Paragraphs 37 & 38 it has been held as under :-

> "37. We feel that it would be useful to make a reference to the judgment of this Court in Perumon Bhagvaty Dvaswom. In this case, the Court, after discussing a number of judgments of this Court as well as that of the High Courts, enunciated the principles which need to be kept in mind while dealing with applications filed under the provisions of Order 22 CPC along with an application under section 5 of the Limitation Act for condonation of delay in filing the application for bringing the legal representatives on record. In SCC para 13 of the judgment, the Court held as under: SCC pp. 329-30
>
> "i The words 'sufficient cause for not making the application within the period of limitation should be

understood and applied in a reasonable, pragmatic, practical and liberal manner, depending upon the facts and circumstances of the case, and the type of case. The words 'sufficient cause' in Section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice, when the delay is not on account of any dilatory tactics, want of bona fides, deliberate inaction or negligence on the part of the appellant.

ii In considering the reason for condonation of delay, the courts are more liberal with reference to application for setting aside abatement, than other cases. While the court will have to keep in view that a valuable right accrues to the legal representatives of the deceased respondent when the appeal abates, it will not punish an appellant with foreclosure of the appeal, or unintended lapses. The courts tend to set aside abatement and decide the matter on merits, rather than terminate the appeal on the ground of abatement.

iii The decisive factor in condonation of delay is not the length of delay, but sufficiency of a satisfactory explanation.

iv The extent or degree of leniency to be shown by a court depends on the nature of application and facts and circumstances of the case. For example, courts view delays in making applications in a pending appeal more leniently than delays in the institution of an appeal. The courts view applications relating to lawyer's lapses more leniently than applications relating to litigant's lapses. The classic example is the difference in approach of courts to applications for condonation of delay in filing an appeal and application for condonation of delay in re-filing the appeal after rectification of defects.

v Want of 'diligence' or 'inaction' can be attributed to an appellant only when something required to be done by him, is not done. When nothing is required to be done, courts do not expect the appellant to be diligent. Where an appeal is admitted by the High Court and is not expected to be listed for final hearing for a few years, an appellant is not expected to visit the Court or his lawyer every few weeks, to ascertain the position nor keep checking whether the consenting respondent is alive. He merely awaits the call or information from his counsel about the listing of the appeal."

We may also notice here that this judgment had been followed with approval by an equi-Bench of this Court in Katari Suryanaryana.

38. Above are the principles which should control the exercise of judicial discretion vested in the court under these provisions. The explained delay should be clearly understood in contradistinction to inordinate unexplained delay. Delay is just one of the ingredients which have to be considered by the court. In addition to this, the court must also take into account the conduct of the parties, bona fide reasons for condonation of delay and whether such delay could easily be avoided by the applicant acting with normal care and caution. The statutory provisions mandate that applications for condonation of delay and applications belatedly filed beyond the prescribed period of limitation for bringing the legal representatives on record, should be rejected unless sufficient cause is shown for condonation of delay. The larger Benches as well as equi-Benches of this Court have consistently followed these principles and have either allowed or declined to condone the delay in filing such applications. Thus, it is the requirement of law that these applications cannot be allowed as a matter of right and even in a routine manner. An applicant must essentially satisfy the above stated ingredients; then alone, the court would be inclined to condone the delay in the filing of such applications."

N. Order 26 Rule 9 C.P.C.

i In ***Durga Prasad v. Praveen Fouzdar and others, 1975 MPLJ 810 = AIR 1975 MP 196,*** it has been held that if there is dispute as to the boundary limits, which cannot be determined in the absence of agreed map, a Commissioner should be appointed to ascertain the dispute. In ***Mangilal and another v. Gaurishankar and another, AIR 1992 MP 309*** it has been held that even if the prayer for such appointment would not have come from the parties, the trial Court itself would have been justified to make that order under O.26, R. 9, C.P.C. [Also see ***Haryana Wakf Board v. Shanti Sarup and others, 2008 8 SCC 671= AIR 2008 SC Supp 616***]

O. Order 39 Rules 1 & 2 CPC

i In the case of ***Gujarat Bottling Co. Ltd. and others v. Coca Cola Co. and others, 1995 5 SCC 545 = AIR 1995 SC 2372*** in paragraph 43 it has been held as under:-

"43. The grant of an interlocutory injunction during the pendency of legal proceedings is a matter requiring the exercise of discretion of the court. While exercising the

discretion the Court applies the following tests – (i Whether the plaintiff has a prima facie case; ii Whether the balance of convenience is in favour of the plaintiff; and iii Whether the plaintiff would suffer an irreparable injury if his prayer for interlocutory injunction is disallowed. The decision whether or not to grant an interlocutory injunction has to be taken at a time when the existence of the legal right assailed by the plaintiff and its alleged violation are both contested and uncertain and remain uncertain till they are established at the trial on evidence. Relief by way of interlocutory injunction is granted to mitigate the risk of injustice to the plaintiff during the period before that uncertainty could be resolved. The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainity were resolved in his favour at the trial. The need for such protection has, however, to be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated. The court must weigh one need against another and determine where the "balance of convenience" lies. [see: ***Wander Ltd. v. Antox India P Ltd.*** SCC at pp. 731-32 in order to protect the defendant while granting an interlocutory injunction in his favour, the Court can require the plaintiff to furnish an undertaking so that the defendant can be adequately compensated if the uncertainty were resolved in his favour at the trial."

ii In the case of ***Maharwal Khewaji Trust Regd., Faridkot v. Baldev Dass, 2004 8 SCC 488 = AIR 2005 SC 104*** it has been held that unless and until a case of irreparable loss or damage is made out by a party to the suit, the court should not permit a change of the said status quo, which may lead to loss or damage being caused to the party who may ultimately succeed, and may further lead to multiplicity of proceedings.

iii In ***Makers Development Services Pvt. Ltd. v. M. Visvesvaraya Industrial Research and Development Centre, 2012 1 SCC 735 = AIR 2012 SC 437*** the Apex Court in Paragraph 11 held as under :-

"11. It is settled law that while passing an interim order of injunction under Order 39 Rules 1 and 2 of the Code of Civil Procedure, 1908, the Court is required to consider three basic principles, namely, a prima facie case, b balance of

convenience and inconvenience, and c irreparable loss and injury. In addition to the abovementioned three basic principles, a court, while granting injunction must also take into consideration the conduct of the parties."

iv It is well known that Court has to take into account the prima facie case, balance of convenience and question of irreparable injury while dealing with the prayer for injunction. In the case of ***Shankerlal v. State of M.P., 1978 MPLJ 419*** it has been held by a Bench of Court while dealing with the question of prima facie case, the Court has to see whether the plaintiff's claim is not frivolous or vexatious, in other words that there is a serious question to be tried in the suit. At the stage of grant of injunction the plaintiff is not required to make out the clear legal title but has to satisfy the Court that he has a fair question to raise as to the legal right claimed by him in the suit. It is not the function of the Court at that stage to resolve disputed questions of fact or difficult questions of law which should be left to be decided at the conclusion of the trial.

Conclusion :-

Role of Stake holders has been emphasised in ***Noor Mohammad v. Jethanand and another, 2013 5 SCC 202*** and it has been held in paragraph 23, 31 and 33 as under :-

"23. We have referred to the aforesaid judgments solely for the purpose of this Court, in different contexts, had dealt with the malady of adjournment and expressed its agony and anguish. Whatever may be the nature of litigation, speedy and appropriate delineation is fundamental to judicial duty. Commenting on the delay in the justice delivery system, although in respect of the criminal trial, Krishna Iyer, J. had stated thus:-

"4. ..... Our justice system, even in grave cases, suffers from slow motion syndrome which is lethal to 'fair trial', whatever the ultimate decision. Speedy justice is a component of social justice since the community, as a whole, is concerned in the criminal being condignly and finally punished within a reasonable time and the innocent being absolved from the inordinate ordeal of criminal proceedings."

31. Thus, from the aforesaid, it is clear as day that everyone involved in the system of dispensation of justice has to inspire the confidence of the common man in the effectiveness of the judicial system. Sustenance of faith has to be treated as spinal sans sympathy or indulgence. If someone considers the task to be Herculean, the same has to be performed with solemnity, for faith is the 'elan vital' of our system.

33. ..... It is the duty of the counsel as the officer of the court to assist the court in a properly prepared manner and not to seek unnecessary adjournments. Getting an adjournment is neither an art nor science. It has never been appreciated by the courts. All who are involved in the justice dispensation system, which includes the Judges, the lawyers, the Judicial officers who work in courts, the law of the State, the Registry to rest. Shifting the blame is not the cure. Acceptance of responsibility and dealing with it like a captain in the frontier is the necessity of the time. It is worthy to state that diligence brings satisfaction. There has to be strong resolve in the mind to carry out the responsibility with devotion. A time has come when all concerned are required to abandon idleness and arouse oneself and see to it that the syndrome of delay does not erode the concept of dispensation of expeditious justice which is the constitutional command. Sagacious acceptance of the deviation and necessitous steps taken for the redressal of the same would be a bright lamp which would gradually become expectation has to become a reality. Expectations are not to remain at the stage of hope. They have to be metamorphosed to actuality. Long back, Francis Bacon, in his aphoristic style, had said, “Hope is good breakfast, but it is bad supper”. We say no more on this score.”

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AFCONS CASE – REMOVAL OF ROAD-BLOCKS IN THE PATH OF MEDIATION

C.V. Sirpurkar
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In India, alternative dispute resolution grabbed the attention of legal fraternity as an effective mechanism for amicable resolution of disputes in late eighties. However, the results through the nineties were not encouraging and the mechanism was not resorted to with desired frequency. Subsequently, S. 89 of the Code of Civil Procedure, was amended, formally introducing the concept of alternative dispute resolution including mediation, in Indian Legal System. Rules 1-A, 1-B and 1-C were also inserted in chapter X of the Code of Civil Procedure to facilitate adoption of one of the modes of alternative dispute resolution by parties to a suit. Though, in view of its sound and laudable objective, the validity of section 89 was upheld by Supreme Court in the case of ***Salem Advocate Bar Association v. Union of India*** reported in ***2003 1 SCC 49*** Salem Bar I, drafting of aforesaid provisions left a lot to be desired. In ***Salem Advocate Bar Association, Tamil Nadu v. Union of India,*** reported in ***2005 6 SCC 344*** Salem Bar II, the Supreme Court applied the principle of purposive construction in an attempt to iron out creases in the provision and make it workable, yet the confusion continued to prevail regarding exact procedure to be adopted by the Courts for referral of disputes to alternative dispute resolution mechanism. This state of affairs resulted in gross underutilization of aforesaid provisions.

The difficulties being faced by trial Courts in implementation of S. 89 were precisely recognized by the Supreme Court in the case of ***Afcons Infrastructure Ltd. & anr. Vs. Cherian Varkey Construction Co. P Ltd. & Ors., 2010 8 SCC 24,*** wherein it was observed that If section 89 is to be read and required to be implemented in its literal sense, it will be a Trial Judge's nightmare as it lays down an impractical, if not impossible, procedure in sub-section 1. A trial Judge cannot be expected to -

1 ascertain whether there exists any elements of settlement which may be acceptable to the parties;

2 formulate the terms of settlement;

3 give them to parties for observations and

4 then reformulate the terms of a possible settlement - before referring it to

a arbitration,

b conciliation,

c judicial settlement,

d Lok Adalat or

e mediation,

- unless, the Judge acts as a conciliator or mediator and holds detailed discussions and negotiations running into hours.

Formulation of terms of settlement merely on the basis of pleadings is neither feasible nor possible. If a trial Judge is made to do so even before framing the issues, the court itself could as well proceed to record the settlement and nothing would be left for the alternative dispute resolution forum to do. The requirement that the court should formulate the terms of settlement was therefore a great hindrance to Courts in implementing section 89 of the Code. The Supreme Court; therefore, diluted this requirement in ***Salem Bar II*** by equating "terms of settlement" to a "summary of disputes" meaning thereby that the court was only required to formulate a "summary of disputes" and not "terms of settlement". In aforesaid view of the matter, the Supreme Court in ***Afcons case*** supra judicially interpreted section 89 and order 10 rule 1-A to mean that before referring the parties to an ADR process, it is not necessary for the Court, to formulate or re-formulate the terms of a possible settlement. It is sufficient if the Court merely describes the nature of dispute in a sentence or two and makes the reference.

In aforesaid case the Apex Court made another departure from the plain language of section 89. It observed that "Judicial settlement" is a term in vogue in USA which refers to a settlement of a civil case with the help of a judge who is not assigned to adjudicate upon the dispute. "Mediation" is also a well known term and it refers to a method of non-binding dispute resolution with the assistance of a neutral third party who tries to help the disputing parties to arrive at a negotiated settlement. When words are universally understood in a particular sense, and assigned a particular meaning in common parlance they cannot be given a different meaning or used in a different sense in a statute. However, the definitions of 'mediation' and 'judicial settlement' under clauses c and d of sub-section 2 of section 89, have been mixed up. Clause c says that for "judicial settlement", the court shall refer the same to a suitable institution or person who shall be deemed to be a Lok Adalat. Clause d provides that where

the reference is to “mediation”, the court shall effect a compromise between the parties by following such procedure as may be prescribed. It makes no sense to call a compromise effected by a court, as “mediation”, as is done in clause d. Nor does it make any sense to describe a reference made by a court to a suitable institution or person for arriving at a settlement as “judicial settlement”, as is done in clause c. In this backdrop, the Court held that mix-up of definitions of the terms “judicial settlement” and “mediation” in section 89 is apparently due to a clerical or typographical error in drafting, resulting in the two words being interchanged in clauses c and (d of section 892. If the word “mediation” in clause d and the words “judicial settlement” in clause c are interchanged, both clauses make perfect sense. The Court went on to conclude that the definitions of ‘judicial settlement’ and ‘mediation’ in clauses c and d of section 892 shall have to be interchanged to correct the draftsman’s error. Clauses c and d of section 892 of the Code will read as under when the two terms are interchanged. Thus, the cob-webs of confusion have now been cleared.

This far reaching judgment of the Supreme Court has removed road-blocks and has paved the way for smooth implementation of S. 89 of the Code. It has given fresh impetus to Alternative Dispute Resolution Mechanism. We can be sure that resort to ADR would now become the norm rather than an exception.

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PART - II

NOTES ON IMPORTANT JUDGMENTS

45. CIVIL PROCEDURE CODE, 1908 – Order 8 Rules 3, 4 & 5, Order 6 Rule 18 and Order 18 Rule 3

EVIDENCE ACT, 1872 – Sections 34, 45 and 114f

i Variance between pleadings and proof when not material? Where variance between pleadings and proof is very little and does not cause prejudice or surprise to opponent, it would not be material.

ii The books of accounts, which have been maintained in the regular course of business, ought not to be rejected without any kind of rebuttal or discarded without any reason.

iii It is obligatory on the part of the defendant to specifically deal with each allegation in the plaint and when the defendant denies any such fact, he must not do so evasively but answer the point of substance – It shall not be sufficient for a defendant to deny generally the grounds alleged by the plaintiff, but he must be specific with each allegation of fact.

Gian Chand and Brothers and another v. Rattan Lal alias Rattan Singh

Judgment dated 08.01.2013 passed by the Supreme Court in Civil Appeal No. 130 of 2013, reported in 2013 2 SCC 606

Extracts from Judgment:

Rules 3, 4 and 5 of Order 8 form an integral code dealing with the manner in which allegations of fact in the plaint should be traversed and the legal consequences flowing from its non-compliance. It is obligatory on the part of the defendant to specifically deal with each allegation in the plaint and when the defendant denies any such fact; he must not do so evasively but answer the point of substance. It is clearly postulated therein that it shall not be sufficient for a defendant to deny generally the grounds alleged by the plaintiffs but he must be specific with each allegation of fact see ***Badat and Co. v. East India Trading Co., AIR 1964 SC 538***.

Another aspect which impressed the High Court was the variance in the pleadings in the plaint and the evidence adduced by the plaintiffs. To appreciate the said conclusion, we have keenly perused Paras 6 and 7 of the plaint and the evidence brought on record. It is noticeable that there is some variance but, as we perceive, we find that the variance is absolutely very little. In fact, there is one variation i.e. at one time, it is mentioned as ₹ 6,64,670 whereas in the pleading, it has been stated as ₹ 6,24,670 and there is some difference with

regard to the date. In our considered view, such a variance does not remotely cause prejudice to the defendant. That apart, it does not take him by any kind of surprise. In ***Celina Coelho Pereira v. Ulhas Mahabaleshwar Kholkar, 2010 1 SCC 217*** the High Court had non-suited the landlord on the ground that he had not pleaded that the business of the firm was conducted by its partners, but by two other persons and that the tenant had parted with the premises by sub-letting them to the said two persons under the garb of partnership by constituting a bogus firm. This Court observed that there is substantial pleading to that effect. The true test, the two-Judge Bench observed, was whether the other side has been taken by surprise or prejudice has been caused to him. In all circumstances, it cannot be said that because of variance between pleading and proof, the rule of ***secundum allegata et probata*** would be strictly applicable. In the present case, we are inclined to hold that it cannot be said that the evidence is not in line with the pleading and in total variance with it or there is virtual contradiction. Thus, the finding returned by the High Court on this score is unacceptable.

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46. CIVIL PROCEDURE CODE, 1908 – Order 23 Rule 3

Requirement of 'in writing and signed by the parties' – Applies only to the first part but does not apply to the second part of the rule 3 – The second part refers to cases where the defendant has satisfied the plaintiff about the claim – This may be by satisfying the plaintiff that his claim cannot be or need not be met or performed – It can also be by discharging or performing the required obligation – Where the defendant so 'satisfied' the plaintiff in respect of the subject-matter of the suit, nothing further remains to be done or enforced and there is no question of any 'enforcement' or 'execution' of the decree to be passed in terms of it.

Mahalaxmi Co-operative Housing Society Ltd. & etc. v. Ashabhai Atmaram Patel

Judgment dated 01.03.2013 passed by the Supreme Court in Civil Appeal No. 2050 of 2013, reported in AIR 2013 SC 961

Extracts from Judgment:

Rule 3 of Order XXIII, on the other hand 'speaks' of compromise of suit. Rule 3 of Order XXIII refers to distinct classes of compromise in suits. The first part refers to lawful agreement or compromise arrived at by the parties out of court, which is under 1976 amendment of the CPC required to be in writing and signed by the parties. The second part of Rule deals with the cases where the defendant satisfies the plaintiff in respect of whole or a part of the suit claim which is different from first part of Rule 3. The expression 'agreement' or 'compromise' refers to first part and not the second part of Rule 3. The second part gives emphasis to the expression 'satisfaction'.

In ***Pushpa Devi v. Rajinder Singh, AIR 2006 SC 2628,*** this court has recognized that the distinction deals with the distinction between the first part and the second part.

> "What is the difference between the first part and second part of Rule 3? The first part refers to situations where an agreement or compromise is entered into in writing and signed by the parties. The said agreement or compromise is placed before the court. When the court is satisfied that the suit has been adjusted either wholly or in part by such agreement, or compromise in writing and signed by the parties and that it is lawful, a decree follows in terms of what is agreed between the parties. The agreement/ compromise spells out the agreed terms by which the claim is admitted or adjusted by mutual concessions or promises, so that the parties thereto can be held to their promises in future and performance can be enforced by the execution of the decree to be passed in terms of it. On the other hand, the second part refers to cases where the defendant has satisfied the plaintiff about the claim. This may be by satisfying the plaintiff that his claim cannot be or need not be met or performed. It can also be by discharging or performing the required obligation. Where the defendant so 'satisfied' the plaintiff in respect of the subject-matter of the suit, nothing further remains to be done or enforced and there is no question of any 'enforcement' or 'execution' of the decree to be passed in terms of it."

Further, it is relevant to note the word 'satisfaction' has been used in contradistinction to the word 'adjustment' by agreement or compromise by the parties. The requirement of 'in writing and signed by the parties' does not apply to the second part where the defendant satisfies the plaintiff in respect of whole or part of the subject-matter of the suit.

The requirement 'in writing and signed by the parties' does not apply to that part of Rule 3 where the defendant satisfies the plaintiff.

The proviso to Rule 3 as inserted by the Amendment Act, 1976 enjoins the court to decide the question where one party alleges that the matter is adjusted by an agreement or compromise but the other party denies the allegation. The court is, therefore, called upon to decide the lis one way or the other. The proviso expressly and specifically states that the court shall not grant such adjournment for deciding the question unless it thinks fit to grant such adjournment by recording reasons.

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47. CONSTITUTION OF INDIA – Article 20 3
CRIMINAL PROCEDURE CODE, 1973 – Section 53
IDENTIFICATION OF PRISIONERS ACT, 1929 – Section 5
INTERPRETATION OF STATUTES:

i Direction to an accused to give his voice sample during the course of investigation of an offence, is not violative of his right under Article 203 of the Constitution – The accused by giving the voice sample merely gives 'identification data' to the investigating agency – Such direction cannot be included in the expression "to be a witness" as by giving voice sample the accused does not convey information based upon his personal knowledge which can incriminate him.

ii Investigation officer cannot take physical sample, including voice samples, from accused without authorization from Magistrate – Direction can be issued by Magistrate under section 53 of the Cr.P.C. – The Magistrate's power to authorize the investigating agency to record voice sample of the person accused of an offence can be traced to Section 5 of the Prisoners Act and Section 53 of the Code – The Magistrate has an ancillary of implied power under Section 53 of the Code to pass an order permitting taking of voice sample to aid investigation.

iii The subordinate criminal courts do not have inherent powers – They can exercise such implied or incidental powers as are necessary to ensure proper investigation.

iv Strict interpretation of penal statutes is not a rule of universal application – Type of construction to be given depends on facts of case.

Ritesh Sinha v. State of Uttar Pradesh and anr.

Judgment dated 07.12.2012 passed by the Supreme Court in Criminal Appeal No. 2003 of 2012, reported in AIR 2013 SC 1132

Extracts from Judgment:

Applying the test laid down by this court in ***State of Bombay v. Kathi Kalu Oghad & ors., AIR 1961 SC 1808*** which is relied upon in ***Selvi and others v. State of Karnataka, AIR 2010 SC 1974,*** I have no hesitation in coming to a conclusion that if an accused person is directed to give his voice sample during the course of investigation of an offence, there is no violation of his right under Article 203 of the Constitution. Voice sample is like finger print impression, signature or specimen handwriting of an accused. Like giving of a finger print impression or specimen writing by the accused for the purposes of investigation, giving of a voice sample for the purposes of investigation, cannot be included in the expression "to be a witness". By giving voice sample the accused does not convey information based upon his personal knowledge which can incriminate him. A voice sample by itself is fully innocuous. By comparing it with tape

recorded conversation, the investigator may draw his conclusion but, voice sample by itself is not a testimony at all. When an accused is asked to give voice sample, he is not giving any testimony of the nature of a personal testimony. When compared with the recorded conversation with the help of mechanical process, it may throw light on the points in controversy. It cannot be said, by any stretch of imagination that by giving voice sample, the accused conveyed any information based upon his personal knowledge and became a witness against himself. The accused by giving the voice sample merely gives 'identification data' to the investigating agency. He is not subjected to any testimonial compulsion. Thus, taking voice sample of an accused by the police during investigation is not hit by Article 203 of the Constitution.

It is the duty of a Police Officer or any person other than a Magistrate authorized by a Magistrate to collect evidence and proceedings under the Code for the collection of evidence are included in 'Investigation'. Collection of voice sample of an accused is a step in investigation. It was argued by learned counsel for the State that various steps which the police take during investigation are not specifically provided in the Code, yet they fall within the wider definition of the term 'investigation' and investigation has been held to include measures that had not been enumerated in statutory provisions and the decisions to that effect of the Rajasthan High Court in ***Mahipal Maderna & Anr. v. State of Rajasthan, 1971 Cri LJ 1405*** and Allahabad High Court in ***Jamshed v. State of U.P., 1976 CriLJ 1680*** have been noticed by this Court in ***Selvi and others v. State of Karnataka, AIR 2010 SC 1974*** and, therefore, no legal provision need be located under which voice sample can be taken. I find it difficult to accept this submission. In the course of investigation, the police do use force. In a country governed by rule of law police actions which are likely to affect the bodily integrity of a person or likely to affect his personal dignity must have legal sanction. That prevents possible abuse of the power by the police. It is trite that every investigation has to be conducted within the parameters of the Code. The power to investigate into a cognizable offence must be exercised strictly on the condition on which it is granted. ***State of West Bengal v. Swapan Guha, AIR 1982 SC 949***. The accused has to be dealt with strictly in accordance with law. Even though, taking of physical evidence which does not amount to communicating information based on personal knowledge to the investigating officer by the accused which may incriminate him, is held to be not violative of protection guaranteed by Article 203, the investigating officer cannot take physical evidence from an accused unless he is authorized by a Magistrate to do so. He cannot assume powers which he does not possess. He can only act on the strength of a direction given to him by a Magistrate and the Magistrate must have power to issue such a direction. In ***Bindeshwari Prasad Singh v. Kali Singh, AIR 1977 SC 2432*** this Court has clarified that subordinate criminal courts have no inherent powers. Similar view has been taken by this court in ***Adalat Prasad v. Rooplal Jindal, AIR 2004 SC 4674.*** Our attention was drawn to ***Sakiri Vasu v. State of Uttar Pradesh, AIR 2008 SC 907*** in support of the submission that the Magistrate has implied or incidental powers.

In that case, this Court was dealing with the Magistrate's powers under Section 1563 of the Code. It is observed that Section 1563 includes all such powers as are necessary for ensuring a proper investigation. It is further observed that when a power is given to an authority to do something, it includes such incidental or implied powers which would ensure proper doing of that thing. It is further added that where an Act confers jurisdiction, it impliedly also grants power of doing all such acts or employ such means as are essentially necessary for execution. If we read ***Bindeshwari Prasad*** supra, ***Adalat Prasad*** supra and ***Sakiri Vasu*** supra together, it becomes clear that the subordinate criminal courts do not have inherent powers. They can exercise such incidental powers as are necessary to ensure proper investigation. Against this background, it is necessary to find out whether power of a Magistrate to issue direction to a police officer to take voice sample of the accused during investigation can be read into in any provisions of the Code or any other law. It is necessary to find out whether a Magistrate has implied or ancillary power under any provisions of the Code to pass such order for the purpose of proper investigation of the case.

First, she firmly rejects the submission advanced on behalf of the State that in the absence of any express provision in that regard, it was within the inherent and implied powers of the Magistrate to direct the accused to give his/ her voice sample to ensure a proper investigation. In this regard, she observes as follows:

> "In the course of investigation, the police do use force. In a country governed by rule of law police actions which are likely to affect the bodily integrity of a person or likely to affect his personal dignity must have legal sanction. That prevents possible abuse of the power by the police. It is trite that every investigation has to be conducted within the parameters of the Code. The power to investigate into a cognizable offence must be exercised strictly on the condition on which it is granted. ***State of West Bengal v. Swapan Guha, AIR 1982 SC 949***. The accused has to be dealt with strictly in accordance with law. Even though, taking of physical evidence which does not amount to communicating information based on personal knowledge to the investigating officer by the accused which may incriminate him, is held to be not violative of protection guaranteed by Article 203, the investigating officer cannot take physical evidence from an accused unless he is authorized by a Magistrate to do so. He cannot assume powers which he does not possess. He can only act on the strength of a direction given to him by a Magistrate and the Magistrate must have power to issue such a direction."

I am fully in agreement with what is said above.

In the ultimate analysis, therefore, I am of the opinion that the Magistrate's power to authorize the investigating agency to record voice sample of the person accused of an offence can be traced to Section 5 of the Prisoners Act and Section 53 of the Code. The Magistrate has an ancillary or implied power under Section 53 of the Code to pass an order permitting taking of voice sample to aid investigation. This conclusion of mine is based on the interpretation of relevant sections of the Prisoners Act and Section 53 of the Code and also is in tune with the concern expressed by this court in ***Kathi Kalu Oghad*** supra that it is as much necessary to protect an accused person against being compelled to incriminate himself, as to arm the agents of law and the law courts with legitimate powers to bring offenders to justice.

The principle that a penal statute should be strictly construed is not of universal application. In ***Murlidhar Meghraj Loya v. State of Maharashtra, AIR 1976 SC 1929*** this court was dealing with the Prevention of Food Adulteration Act, 1954. Speaking for this court, Krishna Iyer, J. held that any narrow and pedantic, literal and lexical construction of Food Laws is likely to leave loopholes for the offender to sneak out of the meshes of law and should be discouraged and criminal jurisprudence must depart from old canons defeating criminal statutes calculated to protect the public health and the nation's wealth. Similar view was taken in ***Kisan Trimbak Kothula & ors. v. State of Maharashtra, AIR 1977 SC 435***. In ***State of Maharashtra v. Natwarlal Damodardas Soni, AIR 1980 SC 593*** while dealing with Section 135 of the Customs Act and Rule 126-H 2d of the Defence of India Rules, a narrow construction given by the High Court was rejected on the ground that will emasculate these provisions and render them ineffective as a weapon for combating gold smuggling. It was further held that the provisions have to be specially construed in a manner which will suppress the mischief and advance the object which the legislature had in view. Therefore, whether the penal statute should be given strict interpretation or not will depend on facts of each case. Considerations of public health, preservation of nation's wealth, public safety may weigh with the court in a given case and persuade it not to give a narrow construction to a penal statute. In the facts of this case, I am not inclined to give a narrow construction to the provisions of the Prisoners Act and Section 53 of the Code. Judicial note can be taken of the fact that there is a great deal of technological advance in means of communication. Criminals are using new methodology in committing crimes. Use of landlines, mobile phones and voice over internet protocol VoIP in the commission of crimes like kidnapping for ransom, extortion, blackmail and for terrorist activities is rampant. Therefore, in order to strengthen the hands of investigating agencies. I am inclined to give purposive interpretation to the provisions of the Prisoners Act and Section 53 of the Code instead of giving a narrow interpretation to them. I, however, feel that Parliament needs to bring in more clarity and precision by amending the Prisoners Act. The Code also needs to be suitably amended. Crime has changed its face. There are new challenges faced by the investigating agency. It is necessary to note that many local amendments have been made in the Prisoners Act by

several States. Technological and scientific advance in the investigative process could be more effectively used if required amendments are introduced by Parliament. This is necessary to strike a balance between the need to preserve the right against self incrimination guaranteed under Article 203 of the Constitution and the need to strengthen the hands of the investigating agency to bring criminals to book.

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48. CRIMINAL PROCEDURE CODE, 1973 – Section 311
INDIAN PENAL CODE, 1860 – Section 302

i Murder trial – Triple murder – Sentence – Whether accused is liable for life imprisonment in regard of each murder? Held, Yes – Accused is liable u/s 302 IPC for imprisonment for life for each of the three offences of murder and the imprisonments for life should not run concurrently but consecutively, to serve the interests of justice.

ii Circumstantial evidence – Motive – Where other circumstances lead to the only hypothesis that the accused has committed the offence, the Court cannot acquit the accused of the offence merely because the motive has not been established.

Sanaullah Khan v. State of Bihar

Judgment dated 15.2.2013 passed by the Supreme Court in Criminal Appeals No. 94 of 2011, reported in 2013 3 SCC 52

Extracts from Judgment:

In ***Javed Masood v. State of Rajasthan, 2010 3 SCC 538,*** cited by the learned counsel for appellant this Court relying on its earlier decision in ***Mukhtiar Ahmed Ansari v. State NCT of Delhi, 2005 5 SCC 258,*** has held that it was open to the defence to rely on the evidence led by the prosecution. . ..... "The evidence of PW 4 may thus create some doubt with regard to the motive of the appellant to kill Ravindra Prasad and Sunny Kumar. Where other circumstances lead to the only hypothesis that the accused has committed the offence, the Court cannot acquit the accused of the offence merely because the motive for committing the offence has not been established in the case. In ***Ujjagar Singh v. State of Punjab, 2007 13 SCC 90*** this Court has held :

> "… It is true that in a case relating to circumstantial evidence motive does assume great importance but to say that the absence of motive would dislodge the entire prosecution story is perhaps giving this one factor an importance which is not due and to use the cliché the motive is in the mind of the accused and can seldom be fathomed with any degree of accuracy."

We have, however, sufficient evidence to establish the culpability of the appellant for three offences of murder as defined in Section 300 IPC, and for each of the three offences of murder, the appellant is liable under Section 302

IPC for imprisonment for life if not the extreme penalty of death. Section 311 CrPC provides that:

> "**31. 1** when a person is convicted at one trial, of two or more offences, the court may, subject to the provisions of Section 71 of the Indian Penal Code 45 of 1860, sentence him for such offences, to the several punishments prescribed therefor which such court is competent to inflict; such punishments when consisting of imprisonment to commence the one after the expiration of the other in such order as the court may direct, unless the court dicides that such punishments shall run concurrently."

Thus, Section 311 CrPC empowers the Court to inflict sentences of imprisonment for more than one offence to run either consecutively or concurrently. In ***Kamalanantha v. State of T.N., 2005 5 SCC 194,*** this Court has held that the term "imprisonment" in Section 31 CrPC Includes the sentence for imprisonment for life. Considering the facts of this case, we are of the opinion that the appellant is liable under Section 302 IPC for imprisonment for life for each of the three offences of murder under Section 300 IPC and the imprisonments for life should not run concurrently but consecutively and such punishment of consecutive sentence of imprisonment for the triple murder committed by the appellant will serve the interest of justice.

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49. CRIMINAL PROCEDURE CODE, 1973 – Section 154

Filing of second FIR vis-à-vis counter FIR – Lodging of two FIRs is not permissible in respect of one and the same incident – It does not encompass filing of second FIR relating to the same or connected cognizable offence – What is prohibited is any further complaint by the same complainant and others against the same accused subsequent to the registration of the case under Cr.P.C. for an investigation in that regard would have already commenced.

Surender Kaushik & ors. v. State of Uttar Pradesh & ors.

Judgment dated 14.02.2013 passed by the Supreme Court in Criminal Appeal No. 305 of 2013, reported in 2013 CriLJ 1570

Extracts from Judgment:

The lodgment of two FIRs is not permissible in respect of one and the same incident. The concept of sameness has been given a restricted meaning. It does not encompass filing of a counter FIR relating to the same or connected cognizable offence. What is prohibited is any further complaint by the same complainant and others against the same accused subsequent to the registration of the case under the Code, for an investigation in that regard would have already commenced and allowing registration of further complaint would amount to an improvement of the facts mentioned in the original complaint. As is further made

clear by the three-Judge Bench in ***Upkar Singh v. Ved Prakash and others, AIR 2004 SC 4320,*** the prohibition does not cover the allegations made by the accused in the first FIR alleging a different version of the same incident. Thus, rival versions in respect of the same incident do take different shapes and in that event, lodgment of two FIRs is permissible.

..... If the involvement of the number of accused persons and the nature of the allegations are scrutinized, it becomes crystal clear that every FIR has a different spectrum. The allegations made are distinct and separate. It may be regarded as a counter complaint and cannot be stated that an effort has been made to improve the allegations that find place in the first FIR. It is well-nigh impossible to say that the principle of sameness gets attracted. We are inclined to think so, for if the said principle is made applicable to the case at hand and the investigation is scuttled by quashing the FIRs, the complainants in the other two FIRs would be deprived of justice. The appellants have lodged the FIR making the allegations against certain persons, but that does not debar the other aggrieved persons to move the court for direction of registration of an FIR as there have been other accused persons including the complainant in the first FIR involved in the forgery and fabrication of documents and getting benefits from the statutory authority. In the ultimate eventuate, how the trial would commence and be concluded is up to the concerned court. The appellants or any of the other complainants or the accused persons may move the appropriate court for a trial in one court. That is another aspect altogether. But to say that it is a second FIR relating to the same cause of action and the same incident and there is sameness of occurrence and an attempt has been made to improvise the case is not correct. Hence, we conclude and hold that the submission that the FIR lodged by the fourth respondent is a second FIR and is, therefore, liable to be quashed, does not merit acceptance.

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50. CRIMINAL PROCEDURE CODE, 1973 – Section 156 3
Power of Magistrate to order for investigation under section 156 3 of Cr.P.C. – Once the power conferred is exercised, same could not be re-exercised after receiving report from the investigating agency.

Bachhu Lal Sharma & others v. State of Madhya Pradesh

Judgment dated 05.12.2012 passed by the High Court of Madhya Pradesh in Misc. Cri. Case No. 4351 of 2012, reported in 2013 CriLJ 1479

Extracts from Judgment:

In ordering an investigation, under Section 156 3 of the Code, the trial Magistrate is not empowered to take cognizance of offence and such cognizance is taken only on the basis of the Complaint of the facts received by him which includes a police report of such facts or information received from any person,

Code which falls in Chapter XV indicates the manner in which the cognizance has to be taken and that the Magistrate may also inquire into the case himself or direct an investigation to be made by a police officer before issuing process. In the present case, the trial Judge at preliminary stage under Section 156 3 of the Code by an order dated 6th September, 2011 directed that the complaint of the complainant under Section 156 3 of Cr.P.C. is sent for inquiry to the Police Superintendent Economic Offences Wing, Gwalior. Thereafter, on receipt of the report dated 11th December 2011, the direction by an order dated 7th April, 2012 is again issued to the effect that since the matter in complaint is related to the misappropriation of Government money and cognizable by the police, hence, after due consideration it has forwarded to the State EOW, Gwalior the complaint and documents filed for registration of the F.I.R. and then to investigate and submit further report. This direction is against the law because once the power conferred under Section 156 3 of Cr. P.C. is exercised, same could not be re-exercised after receiving the report from the Investigating Agency. It is trite in law that the trial Judge ought to have proceeded with the procedure after recording the statements of complainant and witnesses and after considering the document filed with the complaint and also on due consideration of the report filed by the EOW Gwalior, as laid down in Chapter XV of the Code, he could have passed the order either under section 203 or section 204, Cr.P.C. Therefore, subsequent order given by him for investigation after lodging the F.I.R. by the same investigating agency, which has already submitted the report in terms of the directions contemplated in law is not inconformity with the provisions as laid down above.

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51. CRIMINAL PROCEDURE CODE, 1973 – Sections 167 2 a i & ii and 197 Where charge-sheet was filed within 90 days but cognizance was not taken for want of sanction to prosecute, the accused is not entitled to default bail or statutory bail – The right of default bail is available to accused only when charge-sheet has not been filed within 90 or 60 days, as the case may be.

Suresh Kumar Bhikamchand Jain v. State of Maharashtra and Another

Judgment dated 13.2.2013 passed by the Supreme Court in SLP Cri. No. 147 of 2013, reported in 2013 3 SCC 77 3 Judge Bench

Extracts from Judgment:

In our view, grant of sanction is nowhere contemplated under Section 167 CrPC. What the said section contemplates is the completion of investigation in respect of different types of cases within a stipulated period and the right of an accused to be released on bail on the failure of the investigating authorities to do so. The scheme of the provisions relating to remand of an accused, first during the stage of investigation and, thereafter, after cognizance is taken, indicates that the legislature intended investigation of certain crimes to be

completed within 60 days and offences punishable with death, imprisonment for life or imprisonment for a term of not less than 10 years, within 90 days. In the event, the investigation is not completed by the investigating authorities, the accused acquires an indefeasible right to be granted bail, if he offers to furnish bail. Accordingly, if on either the 61st day or the 91st day, an accused makes an application for being released on bail in default of charge-sheet having been filed, the court has no option but to release the accused on bail. The said provision has been considered and interpreted in various cases, such as the ones referred to hereinbefore. Both the decisions in ***Natabar Parida v. State of Orissa, 1975 2 SCC 220,*** and in ***Sanjay Dutt v. State, 1994 5 SCC 410,*** were instances where the charge-sheet was not filed within the period stipulated in Section 167 2 CrPC and an application having been made for grant of bail prior to the filing of the charge-sheet, this Court held that the accused enjoyed an indefeasible right to grant of bail, if such an application was made before the filing of the charge-sheet, but once the charge-sheet was filed, such right came to an end and the accused would be entitled to pray for regular bail on merits.

None of the said cases detract from the position that once a charge-sheet is filed within the stipulated time, the question of grant of default bail or statutory bail does not arise. As indicated hereinabove, in our view, the filing of charge-sheet is sufficient compliance with the provisions of Section 167 2 a ii in this case. Whether cognizance is taken or not is not material as far as Section 167 CrPC is concerned. The right which may have accrued to the petitioner, had charge-sheet not been filed, is not attracted to the facts of this case. Merely because sanction had not been obtained to prosecute the accused and to proceed to the stage of Section 309 CrPC, it cannot be said that the accused is entitled to grant of statutory bail, as envisaged in Section 167 CrPC. The scheme of CrPC is such that once the investigation stage is completed, the court proceeds to the next stage, which is the taking of cognizance and trial. An accused has to remain in custody of some court. During the period of investigation, the accused is under the custody of the Magistrate before whom he or she is first produced. During that stage, under Section 167 2 CrPC the Magistrate is vested with authority to remand the accused to custody, both police custody and/or judicial custody, for 15 days at a time, up to a maximum period of 60 days in cases of offences punishable for less than 10 years and 90 days where the offences are punishable for over 10 years or even death sentence. In the event, an investigating authority fails to file the charge-sheet within the stipulated period, the accused is entitled to be released on statutory bail. In such a situation, the accused continues to remain in the custody of the Magistrate till such time as cognizance is taken by the court trying the offence, when the said court assumes custody of the accused for purpose of remand during the trial in terms of Section 309 CrPC. The two stages are different, but one follows the other so as to maintain a continuity of the custody of the accused with a court.

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52. CRIMINAL PROCEDURE CODE, 1973 – Sections 209, 164, 190 and 227 EVIDENCE ACT, 1872 – Section 73

i When an offence is cognizable by the Sessions Court, the Magistrate cannot probe into the matter and discharge the accused – It is not permissible for him to do so, after considering the evidence on record, as he has no jurisdiction to probe or look into the matter at all – His concern should be to see what provisions of the penal statute have been mentioned and in case an offence triable by the Sessions Court has been mentioned, he must commit the case to the Sessions Court and do nothing else – The scheme of the Code simply provides that the Magistrate can determine, whether the facts stated in the report make out an offence triable exclusively, by the Court of Sessions – Once he reaches the conclusion that the facts alleged in the report, make out an offence triable exclusively by the Court of Sessions, he must commit the case to the Sessions Court.

ii The statement of a person other than the accused, under sub-section 5 of Section 164 of Cr.P.C., can be recorded only and only when, the person making such statement is produced before the Magistrate by the Police – A person cannot be allowed to get his statement recorded before the Magistrate of his own volition.

iii The Magistrate, in exercise of power under section 190 Cr.P.C. can refuse to take cognizance if he is satisfied from the material on the record i.e. complaint, case diary, statement of the witnesses, recorded under section 161 and 164 Cr.P.C. if any, do not make out any offence. However, he cannot appreciate the evidence on record and reach a conclusion as to which evidence is acceptable, or can be relied upon.

iv Hearing the submission of the accused under section 227 of the Cr.P.C. – Means hearing the submissions of the accused on the record of the case as filed by the prosecution and documents submitted therewith and nothing more – Only in a rare case it is permissible to consider the defence evidence, if such material convincingly establishes that the whole prosecution is totally absurd, preposterous or concocted.

v Comparison of handwriting by Court – Not impermissible – But the Court as matter of prudence and caution should hesitate or be slow to base its finding solely on comparison made by it.

Ajay Kumar Parmar v. State of Rajasthan

Judgment dated 27.9.2012 passed by the Supreme Court in Criminal Appeal No. 1496 of 2012, reported in AIR 2013 SC 633

Extracts from Judgment:

When an offence is cognizable by the Sessions Court, the Magistrate cannot probe into the matter and discharge the accused. It is not permissible for him to do so, even after considering the evidence on record, as he has no jurisdiction to probe or look into the matter at all. His concern should be to see what provisions of the penal statute have been mentioned and in case an offence triable by the Sessions Court has been mentioned, he must commit the case to the Session Court and do nothing else.

A three Judge bench of Apex Court in ***Jogendra Nahak & Ors. v. State of Orissa & Ors., AIR 1999 SC 2565,*** held that sub-section 5 of Section 165, deals with the statement of a person, other than the statement of accused i.e. a confession. Such a statement can be recorded, only and only when, the person making such statement is produced before the Magistrate by the police. This Court held that, in case such a course of action, wherein such person is allowed to appear before the Magistrate of his own volition, is made permissible, and the doors of court are opened to them to come as they please, and if the Magistrate starts recording all their statements, then too many persons sponsored by culprits might throng before the portals of the Magistrate courts, for the purpose of creating record in advance to aid the said culprits. Such statements would be very helpful to the accused to get bail and discharge orders.

The scheme of the Code, particularly, the provisions of Sections 207 to 209 Cr.P.C., mandate the Magistrate to commit the case to the Court of Sessions, when the charge-sheet is filed. A conjoint reading of these provisions make it crystal clear that the committal of a case exclusively triable by the Court of Sessions, in a case instituted by the police is mandatory.

The scheme of the Code simply provides that the Magistrate can determine, whether the facts stated in the report make out an offence triable exclusively, by the Court of Sessions. Once he reaches the conclusion that the facts alleged in the report, make out an offence triable exclusively by the Court of Sessions, he must commit the case to the Sessions Court.

The Magistrate, in exercise of its power under Section 190 Cr.P.C., can refuse to take cognizance if the material on record of a case, that is, the complaint, case diary, statements of the witnesses recorded under Sections 161 and 164 Cr.P.C., do not make out any offence. At this stage the Magistrate performs a judicial function. However, he cannot appreciate the evidence on record and reach a conclusion as to which evidence is acceptable, or can be relied upon. Thus, at this stage appreciation of evidence is impermissible. The Magistrate is not competent to weigh the evidence and the balance of probability in the case.

More so, it was permissible for the Judicial Magistrate, Sheoganj, to take into consideration the evidence in defence produced by the appellant as it has consistently been held by this Court that at the time of framing the charge, the only documents which are required to be considered are the documents submitted by the investigating agency along with the charge-sheet. Any document which

the accused want to rely upon cannot be read as evidence. If such evidence is to be considered, there would be a mini trial at the stage of framing of charge. That would defeat the object of the Code. The provision about hearing the submissions of the accused as postulated by Section 227 means hearing the submissions of the accused on the record of the case as filed by the prosecution and documents submitted therewith and nothing more. Even if, in a rare case it is permissible to consider the defence evidence, if such material convincingly establishes that the whole prosecution version is totally absurd, preposterous or concocted, the instant case does not fall in that category. Vide: ***State of Orissa v. Debendra Nath Padhi, AIR 2003 SC 1512; State of Orissa v. Debendra Nath Padhi, AIR 2005 SC 359; S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla and Anr., AIR 2005 SC 3512; Bharat Parikh v. C.B.I. and Anr., 2008 AIR SCW 4842*** and ***Rukmini Narvekar v. Vijaya Satardekar and Ors., AIR 2009 SC 1013***

There is no legal bar to prevent the Court from comparing signatures or handwriting, by using its own eyes to compare the disputed writing with the admitted writing and then from applying its own observation to prove the said handwritings to be the same or different, as the case may be, but in doing so, the Court cannot itself become an expert in this regard and must refrain from playing the role of an expert, for the simple reason that the opinion of the Court may also not be conclusive. Therefore, when the Court takes such a task upon itself, and findings are recorded solely on the basis of comparison of signatures or handwritings, the Court must keep in mind the risk involved, as the opinion formed by the Court may not be conclusive and is susceptible to error, especially when the exercise is conducted by one, not conversant with the subject. The Court, therefore, as a matter of prudence and caution should hesitate or be slow to base its findings solely upon the comparison made by it. However, where there is an opinion whether of an expert, or of any witness, the Court may then apply its own observation by comparing the signatures, or handwritings for providing a decisive weight or influence to its decision.

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53. CRIMINAL PROCEDURE CODE, 1973 – Section 221
INDIAN PENAL CODE, 1860 – Sections 34 and 300

i Murder trial – Omission to frame charge under Section 34 of IPC – whether omission to frame a charge under Section 34 of the IPC would by itself operate as an impediment in the Appellate Court for recording a conviction with the help of that provision? What, therefore, needs to be examined is whether any prejudice was caused to the accused persons on account of absence of charge under Section 34 of the IPC – Mere omission of Section 34 from the charge sheet does not ipso facto or ipso jure lead to any inference or presumption of prejudice having been caused to the accused.

ii Expressions "Failure of Justice" and "Prejudice" – Connotation of. The 'failure of justice' is an extremely pliable or facile expression, which can be made to fit into any situation in any case – The court must endeavour to find the truth – There would be 'failure of justice'; not only by unjust conviction, but also by acquittal of the guilty, as a result of unjust failure to produce requisite evidence of course, the rights of the accused have to be kept in mind and also safeguarded, but they should not be over emphasized to the extent of forgetting that the victims also have rights – It has to be shown that the accused has suffered some disability or detriment in respect of the protections available to him under Indian Criminal Jurisprudence – 'Prejudice', is incapable of being interpreted in its generic sense and applied to criminal jurisprudence – The plea of prejudice has to be in relation to investigation or trial, and not with respect to matters falling outside their scope.

Krishna Govind Patil v. State of Maharashtra, AIR 1963 SC 1413
Darbara Singh v. State of Punjab, 2012 AIR SCW 5301
Gurpreet Singh v. State of Punjab, AIR 2006 SC 191
Relied on.

Chinnam Kameswara Rao & ors. v. State of A.P.

Judgment dated 10.01.2013 passed by the Supreme Court in Criminal Appeal No. 1116 of 2011, reported in 2013 CriLJ 1540

Extracts from Judgment:

The question is whether absence of a charge under Section 34 of the IPC would by itself operate as an impediment in the Appellate Court recording a conviction with the help of that provision?

The legal position was reviewed by a two-Judge Bench of this Court in ***Darbara Singh v. State of Punjab, 2012 AIR SCW 5301.*** In that case also charges were framed against two of the accused persons under Section 302 IPC whereas against the third accused the charge framed was under Section 302 read with Section 34 IPC. The trial Court had acquitted the third accused but convicted the first two accused much in the same manner as is the position in the present case. The contention before this Court was that in the absence of a charge under Section 34 no conviction could be recorded against the appellants under Section 302 especially when the injury inflicted by one of the accused persons was not held to be sufficient in the ordinary course of nature to cause death. Repelling the contention this Court observed:

> "12. It has further been submitted on behalf of the Appellant that, as the appellant was never charged under Section 302 r/w Section 34 Indian Penal Code, unless it is established that the injury caused by the Appellant on the

head of the deceased, was sufficient to cause death, the Appellant ought not to have been convicted under Section 302 Indian Penal Code simplicitor. The submission so advanced is not worth consideration for the simple reason that the Learned Counsel for the Appellant has been unable to show what prejudice, if any, has been caused to the Appellant, even if such charge has not been framed against him. He was always fully aware of all the facts and he had, in fact, gone along with Kashmir Singh and Hira Singh with an intention to kill the deceased. Both of them have undoubtedly inflicted injuries on the deceased Mukhtiar Singh. The Appellant has further been found guilty of causing grievous injury on the head of the deceased being a vital part of the body. Therefore, in the light of the facts and circumstances of the said case, the submission so advanced does not merit acceptance.

* * *

The defect in framing of the charges must be so serious that it cannot be covered under Sections 464/465 Code of Criminal Procedure, which provide that, an order of sentence or conviction shall not be deemed to be invalid only on the ground that no charge was framed, or that there was some irregularity or omission or misjoinder of charges, unless the court comes to the conclusion that there was also, as a consequence, a failure of justice. In determining whether any error, omission or irregularity in framing the relevant charges, has led to a failure of justice, the court must have regard to whether an objection could have been raised at an earlier stage, during the proceedings or not. While judging the question of prejudice or guilt, the court must bear in mind that every accused has a right to a fair trial, where he is aware of what he is being tried for and where the facts sought to be established against him, are explained to him fairly and clearly, and further, where he is given a full and fair chance to defend himself against the said charges.

The ‘failure of justice’ is an extremely pliable or facile expression, which can be made to fit into any situation in any case. The court must endeavour to find the truth. There would be ‘failure of justice’; not only by unjust conviction, but also by acquittal of the guilty, as a result of unjust failure to produce requisite evidence. Of course, the rights of the accused have to be kept in mind and also safeguarded,

but they should not be over emphasized to the extent of forgetting that the victims also have rights. It has to be shown that the accused has suffered some disability or detriment in respect of the protections available to him under Indian Criminal Jurisprudence. 'Prejudice', is incapable of being interpreted in its generic sense and applied to criminal jurisprudence. The plea of prejudice has to be in relation to investigation or trial, and not with respect to matters falling outside their scope. Once the accused is able to show that there has been serious prejudice caused to him, with respect to either of these aspects, and that the same has defeated the rights available to him under jurisprudence, then the accused can seek benefit under the orders of the Court."

In ***Gurpreet Singh v. State of Punjab, AIR 2006 SC 191,*** this Court held that no prejudice could be claimed by the accused merely because charge was framed under Section 302 IPC simpliciter and not with the help of Section 34 IPC. The Court found that the eye witnesses had been cross-examined at length from all possible angles and from suggestions that were put to them to the eye witnesses, the Court was fully satisfied that there was no manner of prejudice caused. What, therefore, needs to be examined is whether any prejudice was caused to the accused persons on account of absence of charge under Section 34 of the IPC. Mere omission of Section 34 from the charge sheet does not ipso facto or ipso jure lead to any inference or presumption of prejudice having been caused to the accused in cases where the conviction is recorded with the help of that provision. It is only if the accused persons plead and satisfactorily demonstrate that prejudice had indeed resulted from the omission of a charge under Section 34 of the IPC that any such omission may assume importance. We do not see any such prejudice having been caused in the present case. In fairness to the learned Senior Counsel for the appellant, we must mention that although he had strenuously argued the legal proposition dealt with by us above when it came to demonstrating a prejudice on account of absence of charge under Section 34 he was unable to do so. The absence of charge under Section 34 of the IPC did not, therefore, affect the legality of the conviction recorded by the High Court.

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54. CRIMINAL PROCEDURE CODE, 1973 – Section 319
CONSTITUTION OF INDIA – Article 21
Addition of new accused – Expression "could be tried together" – Connotation of – Cannot be interpreted to mean that such newly added accused must be tried together with original accused persons – It does not prevent prosecution of newly added accused after trial of others.

Shashikant Singh v. Tarkeshwar Singh and Anr., AIR 2002 SC 2031
Rajendra Singh v. State of U.P. & Anr., AIR 2007 SC 2786
Relied on.

Babubhai Bhimabhai Bokhiria & anr. v. State of Gujarat & Ors.

Judgment dated 30.01.2013 passed by the Supreme Court in Criminal M.P. No. 20502 of 2008, reported in 2013 CriLJ 1547

Extracts from Judgment:

Time now to deal with the contention urged by learned counsel for the respondents, that the expression "could be tried together" appearing in Section 319 of the Cr.P.C. means that the newly added accused must be tried along with the accused already sent up for trial. The question is no longer res integra in the light of the judgment of this Court in ***Shashikant Singh v. Tarkeshwar Singh and Anr., AIR 2002 SC 2031*** where this Court was examining a similar contention that failed to impress this Court and was rejected in the following words:

> "The intention of the provision here is that where in the course of any enquiry into or trial of an offence, it appears to the Court from the evidence that any person not being the accused has committed any offence, the Court may proceed against him for the offence which he appears to have committed. At that stage, the court would consider that such a person could be tried together with the accused who is already before the Court facing the trial. The safeguard provided in respect of such person is that, the proceedings right from the beginning have mandatorily to be commenced afresh and the witnesses reheard. In short there has to be a de novo trial against him. The provision of de novo trial is mandatory. It vitally affects the rights of person so brought before the Court. It would not be sufficient to only tender the witnesses for the cross-examination of such a person. They have to be examined afresh Fresh examination-in-chief and not only their presentation for the purpose of the cross-examination of the newly added accused is the mandate of Section 319 4. The words "could be tried together with the accused" in Section 319 1, appear to be only directory. "Could be" cannot under these circumstances be held to be "must be". The provision cannot be interpreted to mean that since the trial in respect of a person who was before the Court has concluded with the result that the newly added person cannot be tried together with the accused who was before the Court when order under Section 319 1 was passed, the order would become ineffective and inoperative, nullifying the opinion earlier formed by the Court on the basis of the evidence

before it that the newly added person appears to have committed the offence resulting in an order for his being brought before the Court."

To the same effect is the decision of this Court in ***Rajendra Singh v. State of U.P. & Anr., AIR 2007 SC 2786*** where too a similar question arose for consideration. Relying upon the decision of this Court in ***Shashikant Singh's case*** supra this Court held:

"...The mere fact that trial of co-accused Daya Singh has concluded cannot have the effect of nullifying or making the order passed by learned Sessions Judge on 26.5.2005 infructuous".

In the light of the above two decisions rendered by coordinate Benches of this Court, we have no hesitation in holding that even if the addition of the petitioner Babubhai Bhimabhai Bokhiria is held to be justified by the Constitution Bench of this Court, the mere fact that the trial of the remaining accused has already concluded, would not prevent the prosecution of the petitioner for the offences for which he has been summoned by the trial Court.

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55. CRIMINAL PROCEDURE CODE, 1973 – Sections 374 and 386
INDIAN PENAL CODE, 1860 – Section 304-B

i Duty of appellate Court – The first Court of appeal on facts must apply its independent mind and record its own findings on the basis of its own assessment of evidence – Mere reproduction of the assessment of trial Court may not be sufficient – In the absence of independent assessment by appellate Court, its ultimate decision cannot be sustained.

ii Ingredients of the offence of dowry death – Explained.

a That the married woman had died otherwise than under normal circumstances,

b Such death was within seven years of her marriage,

c The prosecution has established that there was cruelty and harassment in connection with demand for dowry soon before her death.

Bakshish Ram and Another v. State of Punjab

Judgment dated 12.03.2013 passed by the Supreme Court in Criminal Appeal No. 969 of 2009, reported in 2013 4 SCC 131

Extracts from Judgment:

A perusal of Section 304-B clearly shows that if a married woman dies otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband in connection with

any demand for dowry, such death shall be called "dowry death" and such husband or relative shall be deemed to have caused the death. The conditions precedent for establishing an offence under this section are:

a That a married woman had died otherwise than under normal circumstances;

b Such death was within seven years of her marriage; and

c The prosecution has established that there was cruelty and harassment in connection with demand for dowry soon before her death.

This section will apply wherever the occurrence of death is preceded by cruelty or harassment by the husband or in-laws for dowry and death occurs in unnatural circumstances. The intention behind the section is to fasten guilt on the husband or in-laws though they did not in fact caused the death.

In ***Arun Kumar Sharama v. State of Bihar, 2010 1 SCC 108*** while reiterating the above view, this Court held that:

> "…In its appellate jurisdiction, all the facts were open to the High Court and, therefore, the High Court was expected to go deep into the evidence and, more particularly, the record as also the proved documents".

Contrary to the above principle, we are satisfied that in the case on hand, the High Court failed to delve deep into the record of the case and the evidence of the witnesses. The role of the appellate court in a criminal appeal is extremely important and all the questions of fact are open before the appellate court. The said recourse has not been adopted by the High Court while confirming the judgment of the trial court.

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56. CRIMINAL PROCEDURE CODE, 1973 – Section 386

I Criminal Appeal – Course to be adopted where counsel for the appellant is absent – Principles from *Bani Singh's case 1996 4 SCC 720* , culled out.

i The Court cannot dismiss an appeal for non-prosecution simpliciter without examining the merits,

ii The Court is not bound to adjourn the matter if both the appellant and his counsel are absent,

iii The Court may as a matter of prudence or indulgence, adjourn the matter but it is not bound to do so,

iv It can dispose of the appeal after perusing the record and judgment of the trial Court,

v If the accused is in jail and cannot, on his own, come to Court, it would be advisable to adjourn the case and fix another date to facilitate the appearance of the appellant accused, if his lawyer is not present and if the lawyer is

absent and the Court deems it appropriate to appoint a lawyer at the State expense to assist it, nothing in law would preclude the Court from doing so,

vi If the case is decided on merits in the absence of the appellants, the higher Court can remedy the situation.

II The dictum in *Mohd. Sukur Ali, 2011 4 SCC 729* to the effect that the court cannot decide a criminal appeal in the absence of the counsel for the accused and that too if the counsel does not appear deliberately or shows negligence in appearing, being contrary to the ratio laid down by the larger Bench in *Bani Singh* supra is *per incuriam*.

K. S. Panduranga v. State of Karnataka

Judgment dated 01.03.2013 passed by the Supreme Court in Criminal Appeal No. 373 of 2013, reported in 2013 3 SCC 721

Extracts from Judgment:

In ***Bani Singh v. State of U.P., AIR 1996 SC 2439,*** a three-Judge Bench was called upon to decide whether the High Court was justified in dismissing the appeal filed by the accused-appellants therein against the order of conviction and sentence issued by the trial court for non-prosecution. The High court had referred to the pronouncement in ***Ram Naresh Yadav v. State of Bihar, AIR 1987 SC 1500*** and passed the order. The three-Judge Bench referred to the scheme of the Code, especially, the relevant provisions, namely, Section 384 and opined that since the High Court had already admitted the appeal following the procedure laid down in section 385 of the Code. Section 384 which enables the High Court to summarily dismiss the appeal was not applicable. The view expressed in ***Shyam Deo Pandey v. State of Bihar, 1971 1 SCC 855*** was approved with slight clarification but the judgment in ***Ram Naresh Yadav*** supra was overruled. The three-judge Bench proceeded to lay down as follows:

> "… It is the duty of the appellant and his lawyer to remain present on the appointed day, time and place when the appeal is posted for hearing. This is the requirement of the Code on a plain reading of Sections 385-386 of the Code. The law does not enjoin that the court shall adjourn the case if both the appellant and his lawyer are absent. If the court does so as a matter of prudence or indulgence, it is a different matter, but it is not bound to adjourn the matter. It can dispose of the appeal after perusing the record and the judgment of the trial court. We would, however, hasten to add that if the accused is in jail and cannot, on his own, come to court, it would be advisable to adjourn the case and fix another date to facilitate the appearance of the appellant-accused if his lawyer is not present. If the lawyer is absent, and the court deems it appropriate to appoint a

> lawyer at State expense to assist it, there is nothing in the law to preclude it from doing so. We are, therefore, of the opinion and we say so with respect, that the Division Bench which decided ***Ram Naresh Yadav*** case supra did not apply the provisions of Sections 385-386 of the Code correctly when it indicated that the appellate court was under an obligation to adjourn the case to another date if the appellant or his lawyer remained absent.
>
> Such a view can bring about a stalemate situation. The appellant and his lawyer can remain absent with impunity, not once but again and again till the court issues a warrant for the appellant's presence. A complaint to the Bar Council against the lawyer for non-appearance cannot result in the progress of the appeal. If another lawyer is appointed at State cost, he too would need the presence of the appellant for instructions and that would place the court in the same situation. Such a procedure can, therefore, prove cumbersome and can promote indiscipline. Even if a case is decided on merits in the absence of the appellant, the higher court can remedy the situation if there has been a failure of justice. This would apply equally if the accused is the respondent for the obvious reason that if the appeal cannot be disposed of without hearing the respondent or his lawyer, the progress of the appeal would be halted."

Regard being had to the principles pertaining to binding precedent, there is no trace of doubt that the principle laid down in ***Mohd. Sukur Ali v. State of Assam, 2011 4 SCC 729*** by the learned Judges that the court should not decide a criminal case in the absence of the counsel of the accused as an accused in a criminal case should not suffer for the fault of his counsel and the court should, in such a situation, must appoint another counsel as amicus curiae to defend the accused and further if the counsel does not appear deliberately, even then the court should not decide the appeal on merit is not in accord with the pronouncement by the lager Bench in ***Bani Singh*** supra. It, in fact, is in direct conflict with the ratio laid down in ***Bani Singh*** supra. As far as the observation to the effect that the court should have appointed amicus curiae, is in a different realm. It is one thing to say that the court should have appointed an amicus curiae and it is another thing to say that the court cannot decide a criminal appeal in the absence of a counsel for the accused and that too even if he deliberately does not appear or shows a negligent attitude in putting his appearance to argue the matter. With great respect, we are disposed to think, had the decision in ***Bani singh*** supra been brought to the notice of the learned Judges, the view would have been different.

Presently, we shall proceed to deal with the concept of per incuriam. In ***A.R. Antulay v. R.S. Nayak, 1988 2 SCC 602,*** Sabyasachi Mukharji, J. as His Lordship then was, while dealing with the said concept, had observed thus:

> "… Per incuriam' are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned, so that in such cases some part of the decision or some step in the reasoning on which it is based, is found, on that account to be demonstrably wrong"

Again, in the said decision, at a later stage, the Court observed: ***A.R. Antulay*** supra

> "… It is a settled rule that if a decision has been given per incuriam the court can ignore it."

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57. CRIMINAL PROCEDURE CODE, 1973 – Section 464

Irregularity or omission or mis-joinder of charges must lead to a failure of justice – In determining the failure of justice, the Court must have regard to whether an objection could have been raised at an earlier stage, during the proceedings or not and the accused suffered some disability or detriment in respect of protection available to him under Indian Criminal Jurisprudence.

Rafiq Ahmed alias Rafi v. State of U.P., AIR 2011 SC 3114, Ratiram & Ors. v. State of M.P. through Inspector of Police, AIR 2012 SC 1485 **and** ***Bhimanna v. State of Karnataka, AIR 2012 SC 3026*** **referred.**

Darbara Singh v. State of Punjab

Judgment dated 12.09.2012 passed by the Supreme Court in Criminal Appeal No. 404 of 2010, reported in AIR 2013 SC 840

Extracts from Judgment:

The defect in framing of the charges must be so serious that it cannot be covered under Sections 464/465, Cr.P.C., which provide that, an order of sentence or conviction shall not be deemed to be invalid only on the ground that no charge was framed, or that there was some irregularity or omission or mis-joinder of charges, unless the court comes to the conclusion that there was also, as a consequence, a failure of justice. In determining whether any error, omission or irregularity in framing the relevant charges, has led to a failure of justice, the court must have regard to whether an objection could have been raised at an earlier stage, during the proceedings or not. While judging the question of prejudice or guilt, the court must bear in mind that every accused has a right to a fair trial, where he is aware of what he is being tried for and where the facts sought to be established against him, are explained to him fairly and clearly, and further, where he is given a full and fair chance to defend himself against the said charges.

The 'failure of justice' is an extremely pliable of facile expression, which can be made to fit into any situation in any case. The court must endeavor to find the truth. There would be 'failure of justice'; not only by unjust conviction, but also by acquittal of the guilty, as a result of unjust failure to produce requisite evidence. Of course, the rights of the accused have to be kept in mind and also safeguarded, but they should not be over emphasised to the extent of forgetting that the victims also have rights. It has to be shown that the accused has suffered some disability or detriment in respect of the protections available to him under Indian Criminal Jurisprudence. 'Prejudice', is incapable of being interpreted in its generic sense and applied to criminal jurisprudence. The plea of prejudice has to be in relation to investigation or trial, and not with respect to matters falling outside their scope. Once the accused is able to show that there has been serious prejudice caused to him, with respect to either of these aspects, and that the same has defeated the rights available to him under jurisprudence, then the accused can seek benefit under the orders of the Court.

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58. ESSENTIAL COMMODITIES ACT, 1955 – Sections 3 and 6-A
DRAVIKRAT PETROLEUM GAS PARADAYA AUR VITRAN VINIYAM AADESH, 2000 – Clause 2
Confiscation of LPG cylinders – 70 LPG cylinders were found to be short in the stock – It constitutes violation of Control Order, 2000 – Those cylinders could not be seized because they were missing – No breach of a provision of Control Order, 2000, had been committed in respect of 388 LPG cylinders seized by the Supply Officer in lieu of the missing cylinders – Seizure not valid in the eyes of law – Therefore, no confiscation order could be passed by the Collector in respect of those LPG gas cylinders.

M/s Col. Gas Service v. Collector, Jabalpur

Judgment dated 10.01.2013 passed by the High Court of Madhya Pradesh in Criminal Revision No. 403 of 2011, reported in 2013 CriLJ 1709

Extracts from Judgment:

Under the Essential Commodities Act there are two modes of action provided to the Supply Officer against a dealer who contravenes the provisions of any Control Order. The first mode is to prosecute the dealer for offence punishable under Section 3/7 of the Act. Secondly the seized property which was seized under the provisions of Section 6-A of the Act can be confiscated. In the present case, the Supply Officers found two to three violations done by the petitioner/ dealer. It was found that 11 cylinders were kept in lying position which was a violation of the Control Order, 2000. Similarly some cylinders were kept on the vehicles for storage whereas, they should be kept in the godown and thirdly, 70 cylinders were found short according to the stock shown in the stock register.

In the present case the learned Collector has confiscated 70 cylinders domestic and therefore, it appears that the Collector took notice of that violation which was only related to the shortage of the cylinders in the stock and therefore, it would not be necessary to discuss the violations relating to the cylinders found lying or cylinders which were found loaded in the various vehicles.

It was apparent from the various documents that the consignments of 388 cylinders was received by the dealer from a refilling station, but, it was yet to be unloaded because it was necessary for the dealer to unload those 388 filled up cylinders and to return 388 empty cylinders by the same vehicle and 388 empty cylinders were not available therefore, the consignment could not be unloaded. It is nowhere alleged by the Supply Officers that a consignment of 388 cylinders was shown by the dealer in the stock and therefore, those 388 cylinders were not in the stock of the dealer and those were not connected with any violation of the Control Order, 2000.

Under such circumstances, whether the Supply Officers could seize those 388 cylinders and out of those 388 cylinders whether the Collector could confiscate 70 cylinders? In this connection the provisions of Section 6-A of the Act may be perused which is as under: –

"6-A. CONFISCATION OF ESSENTIAL COMMODITY.

1 Where any (essential commodity is seized in pursuance of an order made under Section 3 in relation thereto, a report of such seizure shall, without unreasonable delay, be made to the Collector of the district or the Presidency town in which such essential commodity is seized and whether or not a prosecution is instituted for the contravention of such order, the Collector may, if he thinks it expedient so to do, direct the essential commodity so seized to be produced for inspection before him, and if he is satisfied that there has been a contravention of the order may order confiscation of:

a The essential commodity so seized ;

b ……"

According to the provisions of Section 6-A of the Act any essential commodity may be seized if it was found in the violation of any Control Order passed under section 3 of the Act then it may be liable for confiscation if any violation of the provisions of that Control Order is found. In the present case, it is apparent from the record that those 388 cylinders were nowhere connected with any violation of the Control Order, 2000. A consignment of 388 gas cylinders was received by the dealer but it was not taken into the stock of the dealer because it was not unloaded and therefore, such consignment was not at all connected with the violation of the Control Order, 2000. The Supply Officers

took a physical verification of the stock of the dealer but, those 388 cylinders were not in the stock of the dealer and therefore, those could not be seized and therfore, seizure of 388 cylinders was nowhere in pursuance of the provisions of the Control Order, 2000 and therefore, the seizure of those 388 gas cylinders was not under the provision of Section 6-A of the Act.

When 70 gas cylinders were found short in the stock then it was a violation of Control Order, 2000 in the eye of Supply Officers. They could not seize those cylinders because they were missing. There was a shortage of 70 cylinders in the stock and therefore, nothing could be seized by the Supply Officers by way of seizure. The Supply Officers could prosecute the dealer for offence punishable under Section 3/7 of that Act if they so desired, but nothing could be seized for that violation. For the violation of the Control Order, 2000 that 70 cylinders were found short in the stock then no confiscation order could be passed because there was nothing in the stock to be seized by the Supply Officers. It appears that the learned Collector and the Supply Officers tried to punish the dealer otherwise. It was for them to prove the guilt of the dealer for offence punishable under section 3/7 of the Essential Commodities Act so that he could be punished. Instead of adopting that procedure the Supply Officers had seized 388 gas cylinders from a truck which were not in the stock of the dealer at the time of checking.

On the basis of the aforesaid discussion, it is apparent that no seizure could be done from the dealer relating to the shortage of 70 gas cylinders and therefore, the seizure done by the Supply Officers was not related in pursuance of the Control Order, 2000 and therefore, the seizure done by the Supply Officers was not according to the provisions of Section 6-A of the Act and therefore, it was not a valid seizure in the eye of law. Seized property was no where connected with the violation done by the dealer under the Control Order, 2000 and therefore, no confiscation order could be passed by the Collector. The learned Collector as well as the learned XV Additional Sessions Judge, Jabalpur have committed an error of law in passing the order of confiscation and in maintaining that order. Neither the confiscation order nor the judgment passed by the appellate Court can be maintained.

Consequently, the revision filed by the petitioner is hereby allowed. Both the orders passed by the Courts below including the learned Collector and the learned XV Additional Sessions Judge, Jabalpur are hereby set aside. The petitioner is entitled to get back 70 gas cylinders if they are kept by the Supply Officers or if the petitioner had deposited the cost of the cylinders then the petitioner shall be entitled to get the deposited cost of cylinders back from the Collector, Jabalpur.

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59. EVIDENCE ACT, 1872 – Sections 3, 9, 27, 133 and 134
INDIAN PENAL CODE, 1860 – Section 120-B

i Appreciation of evidence in civil and criminal case – The basis of appreciating evidence in a civil or criminal case remains the same but in view of the fact that in a criminal case, the life and liberty of a person is involved, by way of judicial interpretation, Courts have created the requirement of a higher degree of proof.

ii Test identification parade – An accused cannot claim TI parade as a matter of right – Mere identification of an accused in a TI parade is only a circumstance corroborative of the identification of the accused in the Court – Conducting a TI parade is meaningless, if the witnesses know the accused or if they have been shown his photographs or if he has been exposed by the media or to the public – TI parade may be helpful to the investigation to ascertain whether the investigation is being conducted in a proper manner and with proper direction.

iii An accomplice who has not been put to trial is a competent witness as he deposes in Court after taking an oath and there is no prohibition under any law to act upon his deposition without corroboration.

iv In order to constitute the offence of conspiracy, it is not necessary that the person involved has knowledge of all the stages of action – Mere knowledge of the main object/purpose of conspiracy would warrant the attraction of relevant penal provision.

v It is a time honoured principle that evidence must be weighed and not counted – It is the quality and not the quantity which determines the adequacy of the evidence.

R. Shaji v. State of Kerala

Judgment dated 04.02.2013 passed by Supreme Court in Criminal Appeal No. 1774 of 2010, reported in 2013 1 Crimes 217 SC

Extracts from Judgment:

In the matter of appreciation of evidence of witnesses, it is not the number of witnesses, but the quality of their evidence which is important, as there is no requirement in the law of evidence stating that a particular number of witnesses must be examined in order to prove/disprove a fact. It is a time-honoured principle, that evidence must be weighed and not counted. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy, or otherwise. The legal system has laid emphasis on the value provided by each witness, as opposed to the multiplicity or plurality of witnesses. It is thus, the quality and not quantity, which determines the adequacy of evidence, as has been provided by Section 134 of the Evidence Act. Where the law requires the examination of at least one attesting witness, it has been held that the number of witnesses produced over and above this, does not carry any weight. Vide: ***Vadivelu Thevar***

v. State of Madras, AIR 1957 SC 614, Jagdish Prasad v. State of M.P., AIR 1994 SC 1251, Sunil Kumar v. State Govt. of NCT of Delhi, AIR 2004 SC 552, Namdeo v. State of Maharashtra, AIR 2007 SC Supp 100, Kunju @ Balachandran v. State of Tamil Nadu, AIR 2008 SC 1381, Bipin Kumar Mondal v. State of West Bengal, AIR 2010 SC 3638, Mahesh & Anr. v. State of Madya Pradesh, 2011 9 SCC 626 and ***Kishna Chand v. State of Haryana, JT 20131 SC 222*** .

A criminal conspiracy is generally hatched in secrecy, owing to which, direct evidence is difficult to obtain. The offence can therefore be proved, either by adducing circumstantial evidence, or by way of necessary implication. However, in the event that the circumstantial evidence is incomplete or vague, it becomes necessary for the prosecution to provide adequate proof regarding the meeting of minds, which is essential in order to hatch a criminal conspiracy, by adducing substantive evidence in court. Furthermore, in order to constitute the offence of conspiracy, it is not necessary that the person involved has knowledge of all the stages of action. In fact, mere knowledge of the main object/purpose of conspiracy would warrant the attraction of relevant penal provisions. Thus, an agreement between two persons to do, or to cause an illegal act, is the basic requirement of the offence of conspiracy under the penal statute. Vide: ***Mir Nagvi Askari v. CBI, AIR 2010 SC 528, Baldev Singh v. State of Punjab, AIR 2009 SC Supp. 1629, State of M.P. v. Sheetla Sahai, AIR 2009 SC Supp 1744, R. Venkatkrishnan v. CBI, AIR 2010 SC 1812, S. Arul Raja v. State of T.N., 2010 8 SCC 233, Monica Bedi v. State of A.P. AIR 2011 1 SCC 284*** and ***Sushil Suri v. CBI, AIR 2011 SC 1713***.

An argument has been advanced by the learned senior counsel appearing on behalf of the appellant that as the witnesses PW.8 and PW.11 have admitted in their cross-examination, that they have been the accused persons in certain other criminal cases, their testimony should not have been relied upon by the courts below. The argument seems to be rather attractive at the outset, but has no substance, for the reason that the law does not prohibit taking into consideration even the evidence provided by an accomplice, who has not been put to trial. It is a settled legal proposition that the evidence provided by a person who has not been put to trial, and who could not have been tried jointly with the accused can be considered, if the court finds his evidence reliable, and conviction can also safely be based upon it. However, such evidence is required to be considered with care and caution. An accomplice who has not been put to trial is a competent witness, as he deposes in court after taking an oath, and there is no prohibition under any law to act upon his deposition without corroboration. Vide: ***Laxmipat Choraria & Ors. v. State of Maharashtra, AIR 1968 SC 938, Chandran alias Manichan alias Maniyan & Ors. v. State of Kerala, AIR 2011 SC 1594*** and ***Prithipal Singh & Ors. v. State of Punjab & Anr., 2012 1 SCC 10*** .

It has further been submitted that the prosecution failed to hold the test identification parade. Therefore, the prosecution case itself becomes doubtful. In ***Vijay @ Chinee v. State of M.P., 2010 8 SCC 191,*** this Court, while dealing with the effect of non holding of a test identification parade, placed very heavy reliance

upon the judgments of this Court in ***Santosh Singh v. Izhar Hussain & Anr., AIR 1973 SC 2190, State of Himachal Pradesh v. Lekh Raj & Anr., AIR 1999 SC 3916*** and ***Malkhan Singh & Ors. v. State of M.P., AIR 2003 SC 2669*** and held that, the evidence from a test identification parade is admissible under Section 9 of the Evidence Act, 1872. The identification parade is conducted by the police. The actual evidence regarding identification is that which is given by the witnesses in court. A test identification parade cannot be claimed by an accused as a matter of right. Mere identification of an accused in a test identification parade is only a circumstance corroborative of the identification of the accused in court. Further, conducting a test identification parade is meaningless if the witnesses know the accused, or if they have been shown his photographs, or if he has been exposed by the media to the public. Holding a test identification parade may be helpful to the investigation to ascertain whether the investigation is being conducted in a proper manner and with proper direction. See also: ***Munna Kumar Upadhyay v. State of A.P., AIR 2012 SC 2470***.

Be that as it may, when a statement is recorded in court, and the witness speaks under oath, after he understands the sanctity of the oath taken by him either in the name of God or religion, it is then left to the court to appreciate his evidence under Section 3 of the Evidence Act. The Judge must consider whether a prudent man would appreciate such evidence, and not appreciate the same in accordance with his own perception. The basis for appreciating evidence in a civil or criminal case remains the same. However, in view of the fact that in a criminal case, the life and liberty of a person is involved, by way of judicial interpretation, courts have created the requirement of a high degree of proof.

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60. EVIDENCE ACT, 1872 – Sections 3 and 32
CRIMINAL PROCEDURE CODE, 1973 – Section 154

i Delay in lodging FIR – The priority for an eye-witness or any person is not to go to the police station and lodge the FIR but to take the seriously injured deceased to the hospital at the earliest – The doctor had cared first to take steps to give medical aid to the injured and make every effort to save him rather than calling the police immediately – Without any undue delay the doctor informed the police – So, no Court can hold that there is inordinate delay in lodging the FIR.

ii It is a settled principle of law that an FIR can be lodged by any person even by telephonic information – It is not necessary that the FIR can be lodged only by an eye-witness.

iii Effect of a witness being declared hostile – The court can take into consideration the part of the statement of a hostile witness which supports the case of the prosecution – Therefore, it cannot be said that whenever prosecution witnesses are declared hostile, it must prove fatal to the case of the prosecution.

iv The dying declaration is the last statement made by a person at a stage when he is in serious apprehension of his death and expects no chances of survival – At such time it is expected that a person will speak the truth and only the truth.

Once such statement has been made voluntarily – It is reliable and is not an attempt by the deceased to cover up the truth or falsely implicate a person, than the Court can safely rely on such D.D. and it can form the basis of conviction.

M. Sarvana @ K. D. Saravana v. State of Karnataka

Judgment dated 24.07.2012 passed by Supreme Court in Criminal Appeal No. 79 of 2010, reported in 2013 1 Crimes 371 SC

Extracts from Judgment:

Firstly, there was no inordinate delay in lodging the FIR. The incident occurred at 7.45 p.m. on 14th February, 2003. People had gathered at the place of the incident and PW3, who was accompanying the deceased at the relevant time, had taken him to the hospital. The doctor on duty, after having seen the injured person, had reported the matter to the police and then the FIR was lodged. This F.I.R., Ex. P. 10, was lodged at 11:30 p.m. on the same day. We do not think that there had been any inordinate delay in lodging the FIR. The conduct of both the doctor on duty and PW3 was very normal. The priority for PW3 was not to go to the police station and lodge the FIR but to take the deceased, who was seriously injured at that time, to the hospital at the earliest. He did the latter and correctly so. The doctor had cared first to take steps to give medical aid to the injured and make every effort to save the deceased rather than calling the police instantaneously. However, without any undue delay, the doctor informed the police. The police came to the hospital and it was only after the concerned police officer PW2 had met the duty doctor and seen the injured and recorded his statement that the FIR was registered. It is a settled principle of law that an FIR can be lodged by any person, even by telephonic information. It is not necessary that an eye-witness alone can lodge the FIR. In view of these facts, no court can hold that there is inordinate delay in lodging the FIR by accepting the contention raised on behalf of the appellant.

We may notice, at this stage that the court can even take into consideration the part of the statement of a hostile witness which supports the case of the prosecution. Therefore, it cannot be said that whenever prosecution witnesses are declared hostile, it must prove fatal to the case of the prosecution. Reference in this regard can be made to the judgment of this Court in the case of ***Bhajju @ Karan Singh v. State of M.P., 2012 4 SCC 327*** and ***Govindaraju @ Govinda v. State by Sriramapuram Police Station and Anr., 2012 4 SCC 722*** .

The dying declaration is the last statement made by a person at a stage when he in serious apprehension of his death and expects no chance of his survival. At such time, it is expected that a person will speak the truth and only the truth. Normally in such situations the courts attach the intrinsic value of

truthfulness to such statement. Once such statement has been made voluntarily, it is reliable and is not an attempt by the deceased to cover up the truth or falsely implicate a person, then the courts can safely rely on such dying declaration and it can form the basis of conviction. More so, where the version given by the deceased as dying declaration is supported and corroborated by other prosecution evidence, there is no reason for the courts to doubt the truthfulness of such dying declaration.

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61. EVIDENCE ACT, 1872 – Sections 3 and 321
INDIAN PENAL CODE, 1860 – Section 302

i It is not an absolute principle of law that a dying declaration cannot form one and the only basis of conviction when the same is true, reliable and has been recorded in accordance with the established practice and principles.

ii Hostile witness – Appreciation of evidence – The hostility of the witnesses is a relevant consideration but it is not the sole determinative factor for deciding the guilt or otherwise of an accused – The Court can rely on and refer to the statements of the hostile witnesses to the extent that they support the case of the prosecution.

Krishan v. State of Haryana

Judgment dated 13.12.2012 passed by the Supreme Court in Criminal Appeal No. 766 of 2008, reported in 2013 3 SCC 280

Extracts from Judgment:

In ***State of U.P. v. Ram Sagar Yadav, 1985 1 SCC 552*** this Court had followed the same principle, and in turn, specifically referred to the judgment of ***Khushal Rao v. State of Bombay, AIR 1958 SC 22***. Not only this, even in ***Munnu Raja v. State of M.P., 1976 3 SCC 104,*** this Court referred to the judgment in ***Khushal Rao case*** supra. In para 6 of the judgment, the Court stated the same principle that where the dying declaration suffers from an infirmity, the courts will have to adopt a different course to adjudicate the matter in accordance with law.

In ***Ramilaben Hasmukhbhai Khristi v. State of Gujarat, 2002 7 SCC 56,*** this Court held as under:

> "Under the law, dying declaration can form the sole basis of conviction, if it is free from any kind of doubt and it has been recorded in the manner as provided under the law. It may not be necessary to look for corroboration of the dying declaration. As envisaged, a dying declaration is generally to be recorded by an Executive Magistrate with the certificate of a medical doctor about the mental fitness of the declarant to make the statement. It may be in the form of question and answer and the answers be written in the

> words of the person making the declaration. But the court cannot be too technical and in substance if it feels convinced about the trustworthiness of the statement which may inspire confidence such a dying declaration can be acted upon without any corroboration."

In this regard, reference can also be made to a recent judgment of this Court in ***Bhajju v. State of M.P., 2012 4 SCC 327*** .

No doubt, these three witnesses were declared hostile by the Prosecutor with the leave of the court. However, this Court can still rely on and refer to the statements of these three witnesses to the extent that they support the case of the prosecution. PW 1, father of the deceased, stated that he had four daughters and one son. His daughters, Rani and Ram Rati were married to Krishan and Sat Narain about 19 years back. He denied that krishan used to treat his daughter with cruelty. But two vital pieces of information that clearly surfaced from his examination-in-chief are inferred by the following statement "about two years ago, Krishan came to me and demanded money for purchase of vehicle, but I refused... Statement of my daughter was recorded before my arrival." It was, thereafter, that the witness was declared hostile and cross-examined. Similarly, PW 3, mother of the deceased stated that her daughter was never harassed by the accused for bringing less dowry and was declared hostile. PW 4 is the sister of Krishan and she stated that Krishan was not at home and the deceased caught fire while she was preparing the tea. May be, it was not possible for the court to convict the accused on the basis of the statements of PW 1, PW3 and PW4 respectively. These witnesses support the case of the prosecution to a limited *sic* extent. Rani and Ram Rati were two sisters who were married to two real brothers i.e. Krishan and Sat Narain. This fact has duly been noticed by the trial court in its judgment. However, its impact on the case of the prosecution and the reason for not supporting of the prosecution case by these witnesses was completely ignored by the trial court. PW 1 supports the dying declaration to the extent that money was demanded for purchase of a car and he had refused to meet the demand. To that extent, this fully corroborates the dying declaration made by the deceased. Keeping in view the social set up in rural areas, the fact that another daughter Ram Rati, sister of the deceased Rani, had been married in the same family, gives a definite indication as to the reason why these witnesses turned hostile. The hostility of these witnesses would, in no way, render the dying declaration doubtful, much less inadmissible or of no evidentiary value. The hostility of the witnesses is a relevant consideration, but is not the sole determinative factor for deciding the guilt or otherwise of an accused. PW 9, PW 11, PW 14, SDJM, the other police witnesses and to some extent PW 1 have also supported the case of the prosecution and partially the dying declaration.

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62. EVIDENCE ACT, 1872 – Sections 3 and 321

i Dying declaration – Recorded in the presence of relatives – It would not affect the prosecution case.

ii The doctor, while recording the history of the patient, noted that it was the accidental fire while cooking food – Effect of – In the light of categorical statement by the deceased in her dying declaration, the reference made by the doctor while recording the history of the patient would not affect the prosecution case.

Rakesh and Another v. State of Haryana

Judgment dated 22.03.2013 passed by the Supreme Court in Criminal Appeal No. 1779 of 2009, reported in 2013 4 SCC 69

Extracts from Judgment:

Dr. S.P. Chug, Casualty Medical Officer, PGIMS, Rohtak was examined as PW 11. In his evidence, he deposed that on 15-5-1998 at about 1.30 a.m., he examined Kailash w/o Rakesh and on examination he found that the patient was conscious, pulse and BP were unrecordable. He further stated that there were superficial to deep burns involving almost all the body except the legs below the knees. There was approx. 85% burns which were subjected to surgeon's opinion and was kept under observation. Though it was pointed out that while recording the history of the patient, he noted that it was the accidental fire while cooking food, in view of the categorical statement by the deceased in her dying declaration the reference made by PW11 while recording the history of the patient would not affect the prosecution case.

The claim that there was wrong description of names in the dying declaration and some of the relatives were present at the time of recording of the dying declaration are not material contradictions which would affect the prosecution case.

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63. EVIDENCE ACT, 1872 – Section 24

CRIMINAL TRIAL:

Medical Jurisprudence

Whether extra-judicial confession can be made a basis of conviction? An extra-judicial confession is capable of sustaining a conviction provided it is not made under any inducement, is voluntary and truthful – It is eventually the satisfaction of the Court as to the reliability of the confession, keeping in view the circumstances in which the same is made, the person to whom it is alleged to have been made and the corroboration, if available, as to the truth of such a confession that will determine whether the extra-judicial confession could be made a basis for holding the accused guilty.

R. Kuppusamy v. State Represented by Inspector of Police, Ambeiligai

Judgment dated 19.02.2013 passed by the Supreme Court in Criminal Appeal No. 1706 of 2008, reported in 2013 3 SCC 322

Extracts from Judgment:

In ***Gura Singh v. State of Rajasthan, 2001 2 SCC 205,*** a two-Judge Bench of this Court was also dealing with an extra-judicial confession and the question whether the same could be made a basis for recording the conviction against the accused. This Court held that despite the inherent weakness of an extra-judicial confession as a piece of evidence, the same cannot be ignored if it is otherwise shown to be voluntary and truthful. This court also held that extra-judicial confession cannot always be termed as tainted evidence and that corroboration of such evidence is required only as a measure of abundant caution. If the court found the witness to whom confession was made to be trustworthy and that the confession was true and voluntary, a conviction can be founded on such evidence alone. More importantly, the Court declared that courts cannot start with the presumption that extra-judicial confession is always suspect or a weak type of evidence but it would depend on the nature of the circumstances, the time when the confession is made and the credibility of the witnesses who speak about such a confession and whether the confession is voluntary and truthful.

In ***Sahadevan v. State of T.N., 2012 6 SCC 403,*** a two-Judge Bench of this Court comprehensively reviewed the case law on the subject and concluded that an extra-judicial confession is an admissible piece of evidence capable of supporting the conviction of an accused provided the same is made voluntarily and is otherwise found to be truthful. This Court also reiterated the principle that if an extra-judicial confession is supported by a chain of cogent circumstances and is corroborated by other evidence, it acquires credibility. To the same effect are the decisions of this Court in ***Balbir Singh v. State of Punjab, 1996 SCC Cri 1158*** and ***Jaspal Singh v. State of Punjab, 1997 1 SCC 510.***

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64. EVIDENCE ACT, 1872 – Section 27
CRIMINAL PROCEDURE CODE, 1973 – Section 313
Non-examination of independent witnesses and reliance upon the deposition of police officials as "Panch witnesses" – No cross-examination as to why no independent person was made a panch witness – No explanation under Section 313 Cr.P.C. with respect to the incriminating circumstance associated with him – Merely making a bald statement that he was innocent and recoveries had been planted and the call records were false and fabricated documents, is not enough – It may not affect the merits of the case.
State, Govt. of NCT of Delhi v. Sunil & Anr., 2000 AIR SCW 4398, Musheer Khan v. State of Madhya Pradesh, AIR 2010 SC 762 **and** ***The Transport Commissioner, A.P., Hyderabad & Anr. v. S. Sardar Ali & ors., AIR 1983 SC 1225*** **referred)**

Munish Mubar v. State of Haryana
Judgment dated 04.10.2012 passed by the Supreme Court in Criminal Appeal No. 294 of 2010, reported in AIR 2013 SC 912

Extracts from Judgment:

The issue on non-examination of independent witnesses and reliance upon the deposition of police officials as "Panch witnesses" was considered at length by this Court in ***State, Govt. of NCT of Delhi v. Sunil & Anr., 2000 AIR SCW 4398,*** wherein this Court held as under:

> "But if no witness was present or if no person had agreed to affix his signature on the document, it is difficult to lay down, as a proposition of law, that the document so prepared by the police officer must be treated as tainted and the recovery evidence unreliable. The court has to consider the evidence of the investigating officer who deposed to the fact of recovery based on the statement elicited from the accused on its own worth.
>
> We feel that it is an archaic notion that actions of the police officer should be approached with initial distrust . . ..At any rate, the court cannot start with the presumption that the police records are untrustworthy. As a proposition of law the presumption should be the other way around. That official acts of the police have been regularly performed is a wise principle of presumption and recognized even by the legislature. Hence when a police officer gives evidence in court that a certain article was recovered by him on the strength of the statement made by the accused it is open to the court to believe the version to be correct if it is not otherwise shown to be unreliable. It is for the accused, through cross-examination of witnesses or through any other materials, to show that the evidence of the police officer is either unreliable or at least unsafe to be acted upon in a particular case. If the court has any good reason to suspect the truthfulness of such records of the police the court could certainly take into account the fact that no other independent person was present at the time of recovery. But it is not a legally approvable procedure to presume the police action as unreliable to start with, nor to jettison such action merely for the reason that police did not collect signatures of independent persons in the documents made contemporaneous with such actions."

It is obligatory on the part of the accused, while being examined under Section 313, Cr.P.C. to furnish some explanation with respect to the incriminating circumstances associated with him, and the Court must take note of such explanation, even in a case of circumstantial evidence, so to decide, whether or not, the chain of circumstances is complete.

In view of the aforesaid discussion, it is evident that in spite of the fact that in case there is no independent witness of recoveries and panch witnesses are only police personnel, it may not affect the merits of the case. In the instant case, the defence did not ask the issue in the cross-examination to Inspector Shamsher Singh P.W.21 as to why the independent person was not made the panch witness. More so, it was the duty of the appellant to furnish some explanation in his statement under Section 313, Cr.P.C., as under what circumstances his car had been parked at the Delhi Airport and it remained there for 3 hours on the date of occurrence. More so, the call records of his telephone make it evident that he was present in the vicinity of the place of occurrence and under what circumstances recovery of incriminating material had been made on his voluntary disclosure statement. Merely making a bald statement that he was innocent and recoveries had been planted and the call records were false and fabricated documents, is not enough as none of the said allegations made by the appellant could be established.

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65. EVIDENCE ACT, 1872 – Section 113-A
CRIMINAL PROCEDURE CODE, 1973 – Section 154
INDIAN PENAL CODE, 1860 – Section 306

i Delay in lodging FIR – How to deal ? When a man loses his daughter due to cyanide poisoning, he is bound to be disturbed – He would take some time to recover from the shock – Only six hours delay in lodging the FIR in above situation would not make his case untrue.
It is not necessary to give all minute details in FIR – It is not expected to be a treatise.

ii Approach of a Judge towards domestic violence – Judges should be sensitive to women's problems – It is one thing to say that every wear and tear of married life need not lead to suicide and it is another thing to put it so crudely and suggest that one or two slaps on a women is an accepted social norm.
Assault on a women offends her dignity – What effect it will have on a women depends on the facts and circumstances of each case.

iii Deceased was subjected to mental and physical cruelty by the accused in their matrimonial home and she committed suicide within seven years from the date of her marriage – Accused has not been able to rebut the presumption u/s 113-A of Evidence Act and was therefore convicted for the offence punishable under section 306 of I.P.C.

Vajresh Venkatray Anvekar v. State of Karnataka
Judgment dated 03.01.2013 passed by the Supreme Court in Criminal Appeal No. 12 of 2013, reported in 2013 3 SCC 462

Extracts from Judgment:

Surprisingly, six hours, delay in lodging the FIR is taken against the prosecution. The learned Sessions Judge also finds the FIR cryptic.

When a man loses his daughter due to cyanide poisoning, he is bound to break down. He would take time to recover from the shock. Six hours' delay cannot make his case untrue. It is also not proper to expect him to give all minute details at that stage. The FIR contains sufficient details. It is not expected to be a treatise. We feel that the comments on alleged delay in lodging the FIR and its contents are totally unwarranted. For the same reasons, we also reject the submission of the counsel for the appellant that because PW 1 Suresh did not tell the police officers who were present at the scene of offence that the appellant was responsible for the suicide, his FIR lodged after six hours is suspect.

The tenor of the judgment suggests that wife-beating is a normal facet of married life. Does that mean giving one or two slaps to a wife by a husband just does not matter? We do not think that can be a right approach. It is one thing to say that every wear and tear of married life need not lead to suicide and it is another thing to put it so crudely and suggest that one or two assaults on a woman is an accepted social norm. Judges have to be sensitive to women's problems. Perhaps the learned Sessions Judge wanted to convey that the circumstances on record were not strong enough to drive Girija to commit suicide. But to make light of slaps given to Girija which resulted in loss of her eyesight is to show extreme insensitivity. Assault on a woman offends her dignity. What effect it will have on a woman depends on the facts and circumstances of each case. There cannot be any generalization on this issue. Our observation, however, must not be understood to mean that in all cases of assault suicide must follow. Our objection is to the tenor of the learned Sessions Judge's observations. We do not suggest that where there is no evidence the court should go out of its way, ferret out evidence and convict the accused in such cases. It is of course the duty of the court to see that an innocent person is not convicted. But it is equally the duty of the court to see that perpetrators of heinous crimes are brought to book. The abovequoted extracts add to the reasons why the learned Sessions Judge's judgment can be characterised as perverse. They show a mindset which needs to change. There is a phenomenal rise in crime against women and protection granted to women by the Constitution of India and other laws can be meaningful only if those who are entrusted with the job of doing justice are sensitised towards women's problems.

In the ultimate analysis we are of the opinion that the appellant has not been able to rebut the presumption under Section 113-A of the Evidence Act. Girija committed suicide within seven years from the date of her marriage in her matrimonial home. Impact of this circumstance was clearly missed by the trial court. The evidence on record establishes that Girija was subjected to mental and physical cruelty by the appellant in their matrimonial home which drove her

to commit suicide. The appellant is guilty of abetment of suicide. The High Court has rightly reversed the judgment of the trial court acquitting the appellant. The appeal is, therefore, dismissed.

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66. EVIDENCE ACT, 1872 – Section 133
INDIAN PENAL CODE, 1860 – Section 30
Accomplice as a competent witness – Established rule of principle evolved on the basis of human experience since time immemorial is that it is unsafe to record a conviction on the testimony of an approver unless same is corroborated in material particulars by some untainted and credible evidence.

Venkatesha v. State of Karnataka

Judgment dated 08.01.2013 passed by the Supreme Court in Criminal Appeal No. 135 of 2005, reported in 2013 CriLJ 1552

Extracts from Judgment:

Section 133 of the Evidence Act, makes an accomplice a competent witness against the accused person and declares that a conviction shall not be illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. Even so, the established rule of practice evolved on the basis of human experience since times immemorial, is that it is unsafe to record a conviction on the testimony of an approver unless the same is corroborated in material particulars by some untainted and credible evidence. So consistent has been the commitment of the courts to that rule of practice, that the same is now treated as a rule of law. Courts, therefore, not only approach the evidence of an approver with caution, but insist on corroboration of his version before resting a verdict of guilt against the accused, on the basis of such a deposition. The juristic basis for that requirement is the fact that the approver is by his own admission a criminal, which by itself makes him unworthy of an implicit reliance by the Court, unless it is satisfied about the truthfulness of his story by evidence that is independent and supportive of the version given by him. That the approver's testimony needs corroboration cannot, therefore, be doubted as a proposition of law. The question is whether any such corroboration is forthcoming from the evidence adduced by the prosecution in the present case.

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67. INDIAN PENAL CODE, 1860 – Sections 34 and 302

i Common intention – Section 34 lays down a principle of joint liability in the doing of a criminal act – The essence of that liability is to be found in the existence of common intention, animating the accused leading to the doing of a criminal act in furtherance of such intention – It deals with the doing of separate acts, similar or adverse by several persons, if all are done in furtherance of common intention – In such situation, each

person is liable for the result of that as if he had done that act himself – Section 34 of the Penal Code thus lays down a principle of joint criminal liability which is only a rule of evidence but does not create a substantive offence.

ii **How to gather common intention? The common intention is gathered from the manner in which the crime has been committed, the conduct of the accused soon before and after the incident, the weapon carried by the accused and from the nature of the injury caused by one or some of them – So the totality of circumstances must be taken into consideration for gathering common intention.**

iii **Where active participation of all accused persons in murder proved by evidence, conviction u/s 302/34 IPC held proper.**

Goudappa and others v. State of Karnataka

Judgment dated 11.03.2013 passed by the Supreme Court in Criminal Appeal No. 229 of 2007, reported in 2013 3 SCC 675

Extracts from Judgment:

Ordinarily, every man is responsible criminally for a criminal act done by him. No man can be held responsible for an independent act and wrong committed by another. The principle of criminal liability is that the person who commits an offence is responsible for that and he can only be held guilty. However, Section 34 of the Penal Code makes an exception to this principle. It lays down a principle of joint liability in the doing of a criminal act. The essence of that liability is to be found in the existence of common intention, animating the accused leading to the doing of a criminal act in furtherance of such intention. It deals with the doing of separate acts, similar or adverse by several persons, if all are done in furtherance of common intention. In such situation, each person is liable for the result of that as if he had done that act himself. Section 34 of the Penal Code thus lays down a principle of joint criminal liability which is only a rule of evidence but does not create a substantive offence. Therefore, if the act is the result of a common intention that every person who did the criminal act shared, that common intention would make him liable for the offence committed irrespective of the role which he had in its perpetration. Then how to gather common intention? The common intention is gathered from the manner in which the crime has been committed, the conduct of the accused soon before and after the occurrence, the determination and concern with which the crime was committed, the weapon carried by the accused and from the nature of the injury caused by one or some of them. Therefore, for arriving at a conclusion whether the accused had the common intention to commit an offence of which they could be convicted, the totality of circumstances must be taken into consideration.

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68. INDIAN PENAL CODE, 1860 – Sections 53, 53 A, 55 and 57
CRIMINAL PROCEDURE CODE, 1973 – Sections 432 and 433
Once accused is sentenced to undergo life imprisonment unless imprisonment for life is commuted by the competent authority, he has to undergo imprisonment for the whole of his life – It is well settled that section 57 IPC does not limit the punishment of imprisonment of life to a term of 20 years.

Life Convict Bangal @ Khoka @ Prashanta Sen v. B.K. Srivastava and others

Judgment dated 13.02.2013 passed by the Supreme Court in Contempt Petition C No. 363 of 2011, reported in 2013 3 SCC 425

Extracts from Judgment:

It is useful to refer the decision of the Constitution Bench of this Court in ***Gopal Vinayak Godse v. State of Maharashtra, AIR 1961 SC 600.*** In that case, a writ petition, under Article 32 of the Constitution, was filed for an order in the nature of habeas corpus claiming that the petitioner therein has justly served his sentence and should, therefore, be released forthwith. Among other questions, the main question considered by the Constitution Bench was whether there is any provision of law whereunder a sentence for life imprisonment, without any formal remission by the appropriate Government, can be automatically treated as one for a definite period? The Constitution Bench, in an answer to the above question, said "No".

The following discussion and ultimate conclusion are relevant: [***Gopal Vinayak Godse*** supra],

> "... No such provision is found in the Penal Code, 1860, Code of Criminal Procedure or the Prisons Act. Though the Government of India stated before the Judicial Committee in the case of ***Kishori Lal v. King Emperor, AIR 1945 PC 64*** that, having regard to Section 57 of the Penal Code, 1860, 20 years' imprisonment was equivalent to a sentence of transportation for life, the Judicial Committee did not express its final opinion on that question. The Judicial Committee observed in that case:
>
> " .... Assuming that the sentence is to be regarded as one of twenty years, and subject to remission for good conduct, he had not earned remission sufficient to entitle him to discharge at the time of his application, and it was therefore rightly dismissed, but in saying this, Their Lordships are not to be taken as meaning that a life sentence must in all cases be treated as one of not more than twenty years, or that the convict is necessarily entitled to remission.'

Section 57 of the Penal Code has no real bearing on the question raised before us. For calculating fractions of terms of punishment the section provides that transportation for life shall be regarded as equivalent to imprisonment for twenty years. It does not say that transportation for life shall be deemed to be transportation for twenty years for all purposes; nor does the amended section which substitutes the words 'imprisonment for life' for 'transportation for life' enable the drawing of any such all-embracing fiction. A sentence of transportation for life or imprisonment for life must prima facie be treated as transportation or imprisonment for the whole of the remaining period of the convicted person's natural life.

In ***State of M.P. v. Ratan Singh, 1976 3 SCC 470,*** following the decision of the Constitution Bench in ***Gopal Vinayak Godse*** supra, this Court held as under:

> "As regards the first point, namely, that the prisoner could be released automatically on the expiry of 20 years under the Punjab Jail Manual or the Rules framed under the Prisons Act, the matter is no longer ***res integra*** and stands concluded by a decision of this Court in ***Gopal Vinayak Godse*** supra, where the Court, following a decision of the Privy Council in ***Kishori Lal v. King Emperor*** supra observed as follows:
>
> 'Under that section, a person transported for life or any other term before the enactment of the said section would be treated as a person sentenced to rigorous imprisonment for life or for the said term.
>
> If so, the next question is whether there is any provision of law whereunder a sentence for life imprisonment, without any formal remission by appropriate Government, can be automatically treated as one for a definite period. No such provision is found in the Penal Code, 1860, Code of Criminal Procedure or the Prisons Act... A Sentence of transportation for life or imprisonment for life must prima facie be treated as transportation or imprisonment for the whole of the remaining period of the convicted person's natural life.'

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69. INDIAN PENAL CODE, 1860 – Sections 292 and 34
PROBATION OF OFFENDERS ACT, 1958 – Section 4
Accused found guilty of offence u/s 292 IPC showing blue films to 15 young viewers – Looking to the nature of offence High Court and Supreme Court declined to give benefit of Probation of Offenders Act to accused even if this was his first offence.

Gita Ram and another v. State of Himachal Pradesh

Judgment dated 01.02.2013 passed by the Supreme Court in Criminal Appeal No. 227 of 2013, reported in 2013 2 SCC 694

Extracts from Judgment:

In ***Uttam Singh v. State Delhi Admn., 1974 4 SCC 590*** the accused was convicted under Section 292 IPC on the charge of selling a packet of playing cards portraying on the reverse, luridly obscene naked pictures of men and women in pornographic sexual postures. A similar argument was advanced by the counsel to give benefit of Section 4 of the Probation of Offenders Act. The Court rejecting the submission observed:

> "4. ..... There are certain exceptions to this section with which we are not concerned. This section was amended by Act 36 of 1969 when apart from enlarging the scope of the exceptions, the penalty was enhanced which was earlier up to three months or with fine or with both. By the amendment a dichotomy of penal treatment was introduced for dealing with the first offenders and the subsequent offenders. In the case of even a first conviction the accused shall be punished with imprisonment of either description for a term which may extend to two years and with fine which may extend to two thousand rupees. The intention of the legislature is, therefore, made clear by the amendment in 1969 in dealing with these types of offences which corrupt the minds of people to whom these objectionable things can easily reach and it need not be emphasised that the corrupting influence of these pictures is more likely to be upon the younger generation who has got to be protected from being easy prey to these libidinous appeals upon which this illicit trade is based. We are, therefore, not prepared to accept the submission of the learned counsel to deal with the accused leniently in this case."

A similar view was taken by the ***Punjab and Haryana High Court in Bharat*** refusing to give benefit of probation for exhibiting blue film punishable under Sections 292 and 293 IPC. The Court held that:

> "7. Exhibiting blue film in which man and woman were shown in the act of sexual intercourse to young boys would definitely deprave and corrupt their morals. Their minds are impressionable. On their impressionable minds, anything can be imprinted. Things would have been different if that blue film had been exhibited to mature minds. Showing a man and a woman in the act of sexual intercourse tends to appealing to the carnal side of the human nature.

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"9. The petitioner is the first offender and is a petty shopkeeper, maintaining a family and as such [the High Court] feels that he should be dealt with leniently in the matter of sentence. He cannot be released on probation of good conduct as the act imputed to him tended to corrupt and deprave the minds of immature and adolescent boys."

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70. INDIAN PENAL CODE, 1860 – Section 300
CONSTITUTION OF INDIA – Article 21
PROTECTION OF HUMAN RIGHTS ACT, 1994 – Section 12
Death in police encounter – Deceased alleged to be a dreaded criminal against whom 6 FIRs were alleged to have been lodged – Deceased killed in Police encounter – On facts, it appeared to be a case of false encounter – Magisterial inquiry into the encounter – The Inquiring Authority must focus its attention on the circumstances that led to the death of the person in an encounter – He cannot start the inquiry by keeping in mind the antecedents of the deceased.
Guidelines issued by the National Human Rights Commission in police encounter matters – The investigation into the encounter death must be done by an independent investigating agency and that where a complaint is made against the police making out a case of culpable homicide, an FIR must be registered.
However, because of lapse of time, no fresh investigation by an independent agency was ordered – Instead, compensation in the sum of ₹. 20,00,000 awarded for pain and suffering.
Nilabati Behera Smt. alias Lalita Behera through the Supreme Court Legal Aid Committee v. State of Orissa & Ors., AIR 1993 SC 1960 **, relied on.**

Rohtash Kumar v. State of Haryana & Ors.

Judgment dated 14.02.2013 passed by the Supreme Court in Criminal Appeal No. 306 of 2013, reported in 2013 CriLJ 1518

Extracts from Judgment:

It is the case of the police that Sunil was a dreaded criminal and six FIRs were registered against him. In none of the FIRs, however, the name of Sunil appears. It is true that it is not necessary that the FIR must contain the name of an accused. The involvement of an accused can come to light after the police record statements of witnesses and collect relevant materials. It is possible that Sunil may be really involved in all these six cases. It also appears that he was declared absconder. But merely because a person is a dreaded criminal or a proclaimed offender, he cannot be killed in cold blood. The police must make an effort to arrest such accused. In a given case if a dreaded criminal launches a murderous attack on the police to prevent them from doing their duty, the police may have to retaliate and, in that retaliation, such a criminal may get killed. That could be a case of genuine encounter. But in the facts of this case, we are unable to draw such a conclusion.

We find that while inquiring whether the encounter is genuine or not, the Tahsildar, Narnoul is carried away by the fact that six FIRs are registered against Sunil and that he is a proclaimed offender. The inquiring authority must first focus its attention on the circumstances that led to the death of a person in an encounter. If it comes to a conclusion that it was the deceased who had attacked the police to prevent them from arresting him or to prevent them from performing their public duty and, therefore, the police had to retaliate, then the antecedents of the deceased could be taken into consideration as additional material at that stage to support the police version that it was a genuine encounter. But the inquiring authority cannot start the inquiry keeping in mind the antecedents of the deceased.

What disturbs us is the fact that the police have refused to follow the guidelines dated 2/12/2003 issued by the National Human Rights Commission. The two crucial guidelines which have been completely ignored by the police are that the investigation into the encounter death must be done by an independent investigation agency and that whenever a complaint is made against the police making out a case of culpable homicide, an FIR must be registered. In the instant case, the police have refused to even register the FIR on the complaint made by the appellant alleging that his son Sunil was killed by the police. Section 154 of the Code mandates that whenever a complaint discloses a cognizable offence, an FIR must be registered. This Court has, in a catena of judgments, laid down that the police must register an FIR if a cognizable offence is disclosed in the complaint. [See: ***State of Haryana v. Bhajan Lal, AIR 1992 SC 604***]. Ignoring the mandate of Section 154 of the Code and the law laid down by this Court, the police have merely conducted inquiries which appear to be an eyewash. It is distressing to note that till date, no FIR has been registered on the complaint made by the appellant. The only FIR which was registered is against Umesh under Sections 332, 353, 307 read with Section 34 of the IPC at the instance of ASI Ram Sarup. As already noted, in that case, Umesh has been acquitted.

Once we come to a conclusion that Sunil is killed in an encounter, which appears to be fake, it is necessary to direct an independent investigating agency to conduct the investigation so that those who are found to be involved in the commission of crime can be tried and convicted. But, as rightly pointed out by learned amicus curiae directing an investigation, at this distant point of time, will be an exercise in futility. We are informed that witnesses would not be available. It would be difficult to trace the record of the case from the two police stations. Handing over investigation to an independent agency and starting a fresh investigation would be of no use at this stage.

We share the pain and anguish of the appellant, who has lost his son in what appears to be a fake encounter. He has conveyed to us that he is not interested in money but he wants a fresh investigation to be conducted. While we respect the feelings of the appellant, we are unable to direct fresh investigation for the reasons which we have already noted. In such situation, we turn to ***Nilabati***

BeheraSmt. alias Lalita Behera through the Supreme Court Legal Aid Committee v. State of Orissa & Ors., AIR 1993 SC 1960, wherein the appellant's son had died in custody of the police. While noting that custodial death is a clear violation of prisoner's rights under Article 21 of the Constitution of India, this Court moulded the relief by granting compensation to the appellant.

In the circumstances of the case we set aside the impugned judgment and order dated 13/9/2010 and in light of ***Nilabati Behera*** supra, we direct respondent 1 – State of Haryana to pay a sum of Rs.20 lakhs to the appellant as compensation for the pain and suffering undergone by him on account of loss of his son - Sunil. The payment be made by demand draft drawn in favour of the appellant "Rohtash Kumar" within a period of one month from the date of the receipt of this order.

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71. INDIAN PENAL CODE, 1860 – Section 300
EVIDENCE ACT, 1872 – Section 3

i Absence of corpus delicti in murder case – If cogent and satisfactory proof of homicidal death of victim is adduced, absence of corpus delicti by itself is not fatal to a charge of murder.

ii Circumstance of last seen together, appreciation of – It does not by itself necessarily lead to inference that it was the accused who committed the crime – It depends upon facts of each case – Legal position restated.

Rishi Pal v. State of Uttarakhand

Judgment dated 08.01.2013 passed by the Supreme Court in Criminal Appeal No. 928 of 2009, reported in 2013 Cri.L.J 1534

Extracts from Judgment:

In the absence of corpus delicti what the court looks for is clinching evidence that proves that the victim has been done to death. If the prosecution is successful in providing cogent and satisfactory proof of the victim having met a homicidal death, absence of corpus delicti will not by itself be fatal to a charge of murder. Failure of the prosecution to assemble such evidence will, however, result in failure of the most essential requirement in a case involving a charge of murder. That is precisely the position in the case at hand. There is no evidence either direct or circumstantial about Abdul Mabood having met a homicidal death. The charge of murder levelled against the appellant, therefore, rests on a rather tenuous ground of the two having been last seen together to which aspect we shall presently advert when we examine whether the two being last seen together is proved as a circumstance and can support a charge of murder.

The second aspect to which we must straightaway refer is the absence of any motive for the appellant to commit the alleged murder of Abdul Mabood. It is not the case of the prosecution that there existed any enmity between Abdul Mabood and the appellant nor is there any evidence to prove any such enmity.

All that was suggested by learned counsel appearing for the State was that the appellant got rid of Abdul Mabood by killing him because he intended to take away the car which the complainant – Dr. Mohd. Alam had given to him. That argument has not impressed us. If the motive behind the alleged murder was to somehow take away the car, it was not necessary for the appellant to kill the deceased for the car could be taken away even without physically harming Abdul Mabood. It was not as though Abdul Mabood was driving the car and was in control thereof so that without removing him from the scene it was difficult for the appellant to succeed in his design. The prosecution case on the contrary is that the appellant had induced the complainant to part with the car and a sum of Rs.15,000/-. The appellant has been rightly convicted for that fraudulent act which conviction we have affirmed. Such being the position, the car was already in the possession and control of the appellant and all that he was required to do was to drop Abdul Mabood at any place en route to take away the car which he had ample opportunity to do during all the time the two were together while visiting different places. Suffice it to say that the motive for the alleged murder is as weak as it sounds illogical to us. It is fairly well-settled that while motive does not have a major role to play in cases based on eye-witness account of the incident, it assumes importance in cases that rest entirely on circumstantial evidence. [See ***Sukhram v. State of Maharashtra, AIR 2007 SC 3050, Sunil Clifford Daniel Dr. v. State of Punjab, 2012 AIR SCW 5180*** and ***Pannayar v. State of Tamil Nadu by Inspector of Police, AIR 2010 SC 85***]. Absence of strong motive in the present case, therefore, is something that cannot be lightly brushed aside.

In ***Mohibur Rahman and Anr. v. State of Assam, AIR 2002 SC 3064,*** this Court held that the circumstance of last seen does not by itself necessarily lead to the inference that it was the accused who committed the crime. It depends upon the facts of each case. There may however be cases where, on account of close proximity of place and time between the event of the accused having been last seen with the deceased and the factum of death, a rational mind may be persuaded to reach an irresistible conclusion that either the accused should explain how and in what circumstances the victim suffered the death or should own the liability for the homicide. Similarly in ***Arjun Marik and Ors. v. State of Bihar, 1994 Supp 2 SCC 372,*** this Court reiterated that the solitary circumstance of the accused and victim being last seen will not complete the chain of circumstances for the Court to record a finding that it is consistent only with the hypothesis of the guilt of the accused. No conviction on that basis alone can, therefore, be founded. So also in ***Godabarish Mishra v. Kuntala Mishra and Another, AIR 1997 SC 286*** this Court declared that the theory of last seen together is not of universal application and may not always be sufficient to sustain a conviction unless supported by other links in the chain of circumstances. In ***Bharat v. State of M.P., AIR 2003 SC 1433;*** two circumstances on the basis whereof the appellant had been convicted were i the appellant having been last seen with the deceased and ii Recovery of ornaments made at his instance. This Court held:

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> Mere non-explanation cannot lead to the proof of guilt against the appellant. The prosecution has to prove its case against the appellant beyond reasonable doubt. The chain of circumstances, in our opinion, is not complete so as to sustain the conviction of the appellant....."

We may also refer to ***State of Goa v. Sanjay Thakran and Anr., 2007 AIR SCW 2226*** where this Court held that in the absence of any other corroborative piece of evidence to complete the chain of circumstances it is not possible to fasten the guilt on the accused on the solitary circumstance of the two being seen together. Reference may also be made to ***Bodh Raj alias Bodha and Ors. v. State of Jammu and Kashmir, AIR 2002 SC 3164*** where this Court held :

> "The last-seen theory comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases...."

Finally in ***Jaswant Gir v. State of Punjab, 2005 12 SCC 438,*** this Court held that it is not possible to convict Appellant solely on basis of 'last seen' evidence in the absence of any other links in the chain of circumstantial evidence, the Court gave benefit of doubt to accused persons.

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72. INDIAN PENAL CODE, 1860 – Section 300

EVIDENCE ACT, 1872 – Sections 3 and 8

Circumstantial evidence – Motive – Where prosecution relies on circumstantial evidence only, motive is a relevant fact and can be taken into consideration under Section 8 of the Indian Evidence Act, 1872 but where the chain of other circumstances establish beyond reasonable doubt that it is the accused and accused alone who has committed the offence and this is one such case the Court cannot hold that in the absence of motive of the accused being established by the prosecution, the accused cannot be held guilty of the offence.

ii Any behaviour or conduct of the accused would be relevant if it had nexus with the offence alleged to have been committed by him.

Vivek Kalra v. State of Rajasthan

Judgment dated 15.02.2013 passed by the Supreme Court in Criminal Appeal No. 221 of 2007, reported in 2013 CriLJ 1524

Extracts from Judgment:

We have considered the submissions of the learned counsel for the parties and we agree with the learned counsel for the appellant that from the evidence of PW-11 one could not hold that the appellant had committed the murder of the deceased to take revenge on his uncle PW-11, who had not given him Rs. 80,000/- kept in fixed deposit. We are, however, of the opinion that where prosecution relies on circumstantial evidence only, motive is a relevant fact and can be taken into consideration under Section 8 of the Indian Evidence Act, 1872 but where the chain of other circumstances establish beyond reasonable doubt that it is the accused and accused alone who has committed the offence and this is one such case the Court cannot hold that in the absence of motive of the accused being established by the prosecution, the accused cannot be held guilty of the offence. In ***Ujjagar Singh v. State of Punjab, 2008 AIR SCW 33,*** this Court observed:

> "It is true that in a case relating to circumstantial evidence motive does assume great importance but to say that the absence of motive would dislodge the entire prosecution story is perhaps giving this one factor an importance which is not due and to use the cliché the motive is in the mind of the accused and can seldom be fathomed with any degree of accuracy."

Section 8 of the Indian Evidence Act, 1872, however, provides that the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent to it. Hence, any behaviour or conduct of the appellant would be relevant if it had nexus with the offence under Section 302 alleged to have been committed by him. This Court has held in ***Vikramjit Singh alias Vicky v. State of Punjab, 2006 AIR SCW 6197:***

> ".....Conduct of an accused must have nexus with the crime committed. It must form part of the evidence as regards his conduct either preceding, during or after the commission of the offence as envisaged under Section 8 of the Evidence Act...."

The general good behaviour of the appellant and the fact that he had no bad habit have no nexus with the offence alleged against the appellant and are not relevant when other circumstances have established beyond reasonable doubt that it is the appellant and the appellant alone who has committed the murder of the deceased.

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73. INDIAN PENAL CODE, 1860 – Section 302

Sentence – For the offence of Murder – The offender can be punished with death or imprisonment for life – Can a Court award lesser sentence than what is prescribed by law? Held, No – The offender is free to make a representation to the Government for remission.

Ramswaroop and Another v. State of Madhya Pradesh

Judgment dated 12.03.2013 passed by the Supreme Court in Criminal Appeal No. 673 of 2008, reported in 2013 4 SCC 64

Extracts from Judgment:

Finally, the learned counsel for the appellants while pointing out that Ramswaroop Appellant 1 herein has served 7 years, 4 months and 18 days in jail and Chintu Mahte Appellant 2 herein, aged about 80 years, has served 6 years, 4 months and 18 days, pleaded for leniency. We are unable to accept the above claim of the learned counsel for the appellants since the prosecution has established its case beyond reasonable doubt, particularly, the role of the appellants who caused fatal injuries. Since we are affirming the conviction under Section 302, the Court cannot impose a lesser sentence than what is prescribed by law, however, taking note of the age of Chintu Mahte Appellant 2 herein, he is free to make a representation to the Government for remission and if any such representation is made, it is for the Government to pass appropriate orders as per the rules applicable. In the above circumstance, the sentence cannot be altered to the period already undergone and the said request of the counsel for the appellants is rejected.

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74. INDIAN PENAL CODE, 1860 – Section 302

CRIMINAL PROCEDURE CODE, 1973 – Section 354 3

Tests to be applied where death sentence is proposed – To award death sentence, the aggravating circumstances crime test have to be fully satisfied and there should be no mitigating circumstances criminal test favouring the accused – Age cannot be ignored, though it is not determinative factor in all fact situations – Then the Court has to finally apply the Rarest of Rare Cases test – R-R Test depends on the perception of the society and it cannot be "Judge-centric" – Factors that Court has to look into while applying R-R Test.

Guruvail Singh alias Gala & Anr. v. State of Punjab.

Judgment dated 07.02.2013 passed by the Supreme Court in Criminal Appeal No. 1055 of 2006, reported in AIR 2013 SC 1177

Extracts from Judgment:

This Court in ***Sangeet & another v. State of Haryana, AIR 2013 SC 447*** noticed that the circumstances of the criminal referred to in ***Bachan Singh v. State of Punjab, AIR 1980 SC 898*** appear to have taken a bit of back seat in the sentencing process and took the view, as already indicated, balancing test is not the correct

test in deciding whether the capital punishment be awarded or not. We may, in this case, go a little further and decide what will be the test that we can apply in a case where death sentence is proposed.

We notice that, so far as this case is concerned, appellants do not deserve death sentence. Some of the mitigating circumstances, as enunciated in ***Machhi Singh v. State of Punjab, AIR 1983 SC 957*** come to the rescue of the appellants. Age definitely is a factor which cannot be ignored, though not determinative factor in all fact situations. The probability that the accused persons could be reformed and rehabilitated is also a factor to be borne in mind. To award death sentence, the aggravating circumstances crime test have to be fully satisfied and there should be no mitigating circumstances criminal test favouring the accused. Even if both the tests are satisfied as against the accused, even then the Court has to finally apply the Rarest of Rare Cases test R-R Test, which depends on the perception of the society and not "Judge-centric", that is whether the society will approve the awarding of death sentence to certain types of crime or not. While applying this test, the Court has to look into variety of factors like society's abhorrence, extreme indignation and antipathy to certain types of crimes like rape and murder of minor girls, especially intellectually challenged minor girls, minor girls with physical disabilities, old and infirm women with those disabilities, etc. Examples are only illustrative and not exhaustive. Courts award death sentence, because situation demands, due to constitutional compulsion, reflected by the will of the people, and not Judge centric.

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75. INDIAN PENAL CODE, 1860 – Section 302

i Life imprisonment – Connotation of – Always means imprisonment for whole of remaining natural life of the convicted person – It cannot be equivalent to imprisonment for 14 years or 20 years or 30 years – But the President of India or the Governor of State may remit it under Article 72 or 161 of the Constitution of India.

ii Provisions in section 432 2 to 5 of Cr.P.C., are meant to check arbitrary remissions.

Mohinder Singh v. State of Punjab

Judgment dated 28.01.2013 passed by the Supreme Court in Criminal Appeal No. 1278 of 2010, reported in 2013 3 SCC 294

Extracts from Judgment:

Life imprisonment cannot be equivalent to imprisonment for 14 years or 20 years or even 30 years, rather it always means the whole natural life. This Court has always clarified that the punishment of a fixed term of imprisonment so awarded would be subject to any order passed in exercise of clemency powers of the President of India or the Governor of the State, as the case may be. Pardons, reprieves and remissions under Article 72 or Article 161 of the

Constitution of India are granted in exercise of prerogative power. As observed in ***State of U.P. v. Sanjay Kumar, 2012 8 SCC 537*** there is no scope of judicial review of such orders except on very limited grounds such as the non-application of mind while passing the order, non-consideration of relevant material, or if the order suffers from arbitrariness. The power to grant pardons and to commute sentences is coupled with a duty to exercise the same fairly, reasonably and in terms of restrictions imposed in several provisions of the Code.

In order to check all arbitrary remissions, the Code itself provides several conditions. Sub-sections 2 to 5 of Section 432 of the Code lay down basic procedure for making an application to the appropriate Government for suspension or remission of sentence either by the convict or someone on his behalf. We are of the view that exercise of power by the appropriate Government under sub-section 1 of Section 432 of the Code cannot be *suo motu* for the simple reason that this is only an enabling provision and the same would be possible subject to fulfillment of certain conditions. Those conditions are mentioned either in the Jail Manual or in statutory rules. This Court in various decisions has held that the power of remission cannot be exercised arbitrarily. In other words, the decision to grant remission has to be well informed, reasonable and fair to all concerned. The statutory procedure laid down in Section 432 of the Code itself provides this check on the possible misuse of power by the appropriate Government. As rightly observed by this Court in ***Sangeet v. State of Haryana, 2013 2 SCC 452,*** there is a misconception that a prisoner serving life sentence has an indefeasible right to release on completion of either 14 years' or 20 years' imprisonment. A convict undergoing life imprisonment is expected to remain in custody till the end of his life, subject to any remission granted by the appropriate Government under Section 432 of the Code which in turn is subject to the procedural checks mentioned in the said provision and further substantive check in Section 433-A of the Code.

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76. INDIAN PENAL CODE, 1860 – Sections 302, 364 A and 201

i Once the person concerned has been shown as having been kidnapped, the onus would shift on the kidnapper to establish how and when the kidnapped person came to be released from his custody – In the absence of any such proof produced by the kidnapper, it would be natural to infer/presume that the kidnapped person continued in the kidnapper's custody till he was eliminated.

ii Death sentence – When awarded? The guidelines laid down in *Bacchan Singh v. State of Punjab, 1980 2 SCC 684* culled out – Law on the point restated.

Sunder alias Sundararajan v. State by Inspector of Police

Judgment dated 05.02.2013 passed by the Supreme Court in Criminal Appeal No. 300 of 2011, reported in 2013 3 SCC 215

Extracts from Judgment:

Having given our thoughtful consideration to the submission advanced at the hands of the learned counsel for the appellant, we are of the view, that the instant submission is wholly misplaced and fallacious. Insofar as the instant aspect of the matter is concerned, reference may be made to the judgment rendered by this Court in ***Sucha Singh v. State of Punjab, 2001 4 SCC 375*** wherein it was held as under:

> "We are mindful of what is frequently happening during these days. Persons are kidnapped in the sight of others and are forcibly taken out of the sight of all others and later the kidnapped are killed. If a legal principle is to be laid down that for the murder of such kidnapped there should necessarily be independent evidence apart from the circumstances enumerated above, we would be providing a safe jurisprudence for protecting such criminal activities. India cannot now afford to lay down any such legal principle insulating the marauders of their activities of killing kidnapped innocents outside the ken of others."

A perusal of the aforesaid determination would reveal that having proved the factum of kidnapping, the inference of the consequential murder of the kidnapped person is liable to be presumed. We are one with the aforesaid conclusion. The logic for the aforesaid inference is simple. Once the person concerned has been shown as having been kidnapped, the onus would shift on the kidnapper to establish how and when the kidnapped individual came to be released from his custody. In the absence of any such proof produced by the kidnapper, it would be natural to infer/presume, that the kidnapped person continued in the kidnapper's custody till he was eliminated. The instant conclusion would also emerge from Section 106 of the Evidence Act, 1872.

Besides the submission advanced on the merits of the controversy, the learned counsel for the appellant-accused also assailed the confirmation by the High Court of the death sentence imposed by the trial court. During the course of hearing, it was the vehement contention of the learned counsel for the appellant-accused, that infliction of life imprisonment, in the facts and circumstances of this case, would have satisfied the ends of justice. It was also the contention of the learned counsel for the appellant-accused, that the facts and circumstances of this case are not sufficient to categorise the present case as the "rarest of the rare case", wherein only the death penalty would meet the ends of justice. In order to support the aforesaid contention, the learned counsel for the appellant-accused, in the first instance, placed reliance on a recent judgment rendered by this Court in ***Haresh Mohandas Rajput v. State of Maharashtra, 2011 12 SCC 56,*** wherein, having taken into consideration earlier judgments, this Court delineated the circumstances in which the death penalty could be imposed. Reliance was placed on the following observations recorded therein:

"***Death sentence – when warranted***

The guidelines laid down in ***Bachan Singh v. State of Punjab, 1980 2 SCC 684*** may be culled out as under:

i The extreme penalty of death need not be inflicted except in the gravest cases of extreme culpability.

ii Before opting for the death penalty the circumstances of the "offender" also require to be taken into consideration along with the circumstances of the "crime."

iii Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

iv A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised'.

In ***Machhi Singh v. State of Punjab, 1983 3 SCC 470*** this Court expanded the "rarest of the rare' formulation beyond the aggravating factors listed in ***Bachan Singh*** supra to cases where the 'collective conscience' of the community is so shocked that it will expect the holders of the judicial power centre to inflict the death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining the death penalty, such a penalty can be inflicted. But the Bench in this case underlined that full weightage must be accorded to the mitigating circumstances in a case and a just balance had to be struck between the aggravating and the mitigating circumstances.

'The rarest of the rare case' comes when a convict would be a menace and threat to the harmonious and peaceful coexistence of the society. The crime may be heinous or brutal but may not be in the category of 'the rarest of the rare case'. There must be no reason to believe that the

accused cannot be reformed or rehabilitated and that he is likely to continue criminal acts of violence as would constitute a continuing threat to the society. The accused may be a menace to the society and would continue to be so, threatening its peaceful and harmonious coexistence. The manner in which the crime is committed must be such that it may result in intense and extreme indignation of the community and shock the collective conscience of the society. Where an accused does not act on any spur of the moment provocation and indulges himself in a deliberately planned crime and meticulously executes it, the death sentence may be the most appropriate punishment for such a ghastly crime. The death sentence may be warranted where the victims are innocent children and helpless women. Thus, in case the crime is committed in a most cruel and inhuman manner which is an extremely brutal, grotesque, diabolical, revolting and dastardly manner, where his act affects the entire moral fibre of the society e.g. crime committed for power or political ambition or indulging in organized criminal activities, death sentence should be awarded. See ***C. Muniappan v. State of T.N., AIR 2010 SC 3718, Dara Singh v. Republic of India, 2011 2 SCC 490, Surendra Koli v. State of U.P., 2011 4 SCC 80, Mohd. Mannan v. State of Bihar, 2011 5 SCC 317*** and ***Sudam v. State of Maharashtra, 2011 7 SCC 125*** .

Thus, it is evident that for awarding the death sentence, there must be existence of aggravating circumstances and the consequential absence of mitigating circumstances. As to whether the death sentence should be awarded, would depend upon the factual scenario of the case in hand."

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77. INDIAN PENAL CODE, 1860 – Section 304-B
Sentence – Young age of the accused and the fact that he is the only earning member in his family, are no grounds for leniency and to reduce sentence below minimum prescribed.

Mustafa Shahadal Shaikh v. State of Maharashtra

Judgment dated 14.09.2012 passed by the Supreme Court in Criminal Appeal No. 1406 of 2008, reported in AIR 2013 SC 851

Extracts from Judgment:

Finally, faint argument was advanced by the counsel for the appellant for reduction of the sentence of appellant-accused considering his age, viz., 23 years at the time of occurrence. It is also pleaded that he is the only earning

member in his family and prayed for leniency. These aspects were duly considered by the trial court while awarding punishment. Further Section 304B itself mandates that in the case of conviction in terms of sub-section 1 the imprisonment shall not be less than 7 years but which may extend to imprisonment for life. In view of the fact that the prosecution has established its case beyond reasonable doubt by placing acceptable evidence and of the fact that minimum sentence of seven years has been prescribed, it cannot be possible to award sentence less than 7 years. These aspects were also considered by the High Court. Accordingly, we reject the similar request made by the counsel for the appellant.

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78. INDIAN PENAL CODE, 1860 – Sections 395 and 396
CRIMINAL PROCEDURE CODE, 1973 – Section 3543

i Criminal trial – Procedure to properly award sentence in a criminal case – A judge, while imposing sentence, should not be swayed away with any kind of sensational aspect and individual predilections – If it is done, it would tantamount to entering into an area of emotional labyrinth or area of mercurial syllogism. Speeches or deliberations in any academic sphere are not to be taken recourse to unless they are in consonance with binding precedents – Binding precedents should be the Bible of a Judge and there should not be any deviation.

ii A criminal court should not be influenced by the views or opinions expressed by the Judges on a private platform – The views or opinions expressed by the Judges, jurists, academicians, law teachers may be food for thought – Even the discussions or deliberations made on the State Judicial Academies or the National Judicial Academy at Bhopal, only update or open new vistas of knowledge of Judicial Officers – Criminal courts have to decide the cases before them examining the relevant facts and evidence placed before them, applying binding precedents – Judges' or academicians' opinions, predilection, fondness, inclination, proclivity on any subject, however eminent they are, shall not influence a decision-making process – A criminal case which rests only on the evidence adduced by the prosecution as well as by the defence and guided by settled judicial precedents – The National Judicial Academy and the State Judicial Academies should educate our Judicial Officers in this regard so that they will not commit such serious errors in future.

iii Death Sentence – Imprisonment for the life is the rule and death sentence is an exception – S.354 3 Cr.P.C states that wherever a Court awards a death sentence it shall record special reasons – In this case the special reason that weighed with the trial Judge,

were only one's predilection or inclination to award death sentence, purely Judge-centric – The approach was purely "crime-centric".

Oma @ Omprakash and another v. State of Tamil Nadu

Judgment dated 11.12.2012 passed by the Supreme Court in Criminal Appeal No. 143 of 2007, reported in 2013 3 SCC 440

Extracts from Judgment:

We are unhappy in the manner in which the Sessions Court has awarded death sentence in the instant case. The tests laid down by this Court for determining the rarest of rare cases in ***Bachan Singh v. State of Punjab, 1980 2 SCC 684 and Machhi Singh v. State of Punjab, 1980 3 SCC 470*** and other related decisions like ***Jagmohan Singh v. State of U.P., 1973 1 SCC 20,*** were completely overlooked by the Sessions Court. The Sessions Court had gone astray in referring to the views expressed by the then Chief Justice of Madras in a lecture delivered at Madurai, which advice according to the Sessions Judge was taken note of by another learned Judge in delivering a judgment on rowdy panchayat system. The Sessions Judge has stated that he took into consideration that judgment and the provision in Section 396 of the Penal Code to hold that the accused had committed the murder and deserved death sentence. Further, the trial court had also opined that the imposition of death sentence under Section 396 IPC is the only weapon in the hands of the judiciary under the prevailing law to help to eliminate the crime and the judgment of the trial court should be on that ground.

It is apposite to refer to the special reasons which weighed with the Sessions Judge to award the death sentence which read as follows:

> "In this case, it has been decided by this court to impose the maximum sentence of death on Accused 1 and 2 under Section 396 of the Penal Code and under Section 354 3 of the Criminal Procedure Code, the special reasons for awarding such sentence to be given show that the case is a case of the rarest of rare cases. Therefore, this court gives the following reasons:
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> a ★ ★ ★
>
> b Before the enactment of the Criminal Procedure Code, many years ago, civilisation had come into existence. From the rule of kingdom, the rule of people and the democracy and constitution came into existence in many countries. In these circumstances, the death sentence is prevailing in all the countries in different forms and that sentence is imposed on such criminal who deserves the same. We all know that more particularly in the court like in America, the sentence like 'lynching' has attained the legal form and given

to the deserving criminals and in Arab countries the law provides for imposing sentence like 'slashing', beheading' taking the organ for organ like 'an eye for an eye', 'a tooth for a tooth'. The abovementioned facts are the development of criminal jurisprudence. Therefore, this court is of the opinion that it is proper to impose death sentence on the accused in this case.

c ★ ★ ★

d ★ ★ ★

e In this case, the accused came from a State about 2000 km from our State and they did not think that the victims were also human like them but they thought only about the well-being of their family and their own life and committed the fear of death amongst the common public of our State by committing robbery and murder for about 11 years. Therefore, this court is of the opinion that the death sentence that would be imposed on them would create a fear amongst the criminals who commit such crime and further this case is the rarest of rare cases that call for the imposition of death sentence.

f The Honourable Chief Justice of the High Court of Madras, Justice A.P. Shah while delivering a lecture at Madurai said strict laws should be enacted as regard to child abuse and the persons committing the crime should be punished accordingly. This advice was taken note of by Honourable Justice Karpagavinayagm while delivering a judgment on rowdy punchayat system. He ordered that the Government should enact suitable law to eliminate this menace. Taking this judgment into consideration and that there is a provision in Section 396 of the Penal Code that the people involved in dacoity can be imposed with death sentence, the accused who have committed the murder without any pity deserve to be imposed with the death sentence. This court is also of the opinion that the imposition of death sentence under Section 396 of the Penal Code is the only weapon in the hands of the judiciary under the prevailing law to help to eliminate the crime. Accordingly, this judgment should be. Therefore, this court is of the view that the death sentence should be imposed on the accused."

We cannot countenance any of the reasons which weighed with the Sessions Judge in awarding the death sentence. Reasons stated in paras 36 b and e in awarding death sentence in this case expose the ignorance of the learned Judge of the criminal jurisprudence of this country.

Section 354 3 of the Code states that whenever a court awards death sentence, it shall record special reasons. Going by the current penological thought, imprisonment for life is the rule and death sentence is an exception. The legislators, intent behind enacting Section 354 3 clearly demonstrates the concern of the legislature. This principle has been highlighted in several judgments of this Court apart from the judgments already referred to. Reference may also be made to few of the judgments of this Court, such as ***Ronny v. State of Maharashtra, 1998 3 SCC 625, Allauddin Mian v. State of Bihar, 1989 3 SCC 5, Bantu v. State of M.P., 2001 9 SCC 615,*** etc. We are disturbed by the casual approach made by the Sessions Court in awarding the death sentence. The "special reasons" that weighed with the trial Judge to say the least, were only one's predilection or inclination to award death sentence, purely Judge-centric. The learned Judge has not discussed the aggravating or mitigating circumstances of this case, the approach was purely "crime-centric".

In the case at hand, as is perceptible, the leaned trial Judge has primarily been guided by some kind of notion and connected them with civilized world and democracy which, in my considered opinion, should not have been at all referred to. He should remember the language of Article 302 IPC and the precedents that govern the field for imposition of death penalty. In that event, the perception might have been wrong but it could not have been said that it is based on some kind of personal philosophy. Thus, the view expressed does not sustain the concept of law and rather, on the contrary, exhibits a sanctuary of errors. Speeches or deliberations in any academic sphere are not to be taken recourse to unless they are in consonance with binding precedents. A speech sometimes may reflect a personal expression, a desire and, where a view may not be appositely governed by words, is likely to confuse the hearers. It is a matter of great remorse that the learned trial Judge had ventured to enter into such kind of adventure. It can be stated with certitude that in a criminal trial, while recording the sentence, he should have been guided and governed by established principles and not by personal notions or even ideas of eminent personalities. Binding judgments should be the Bible of a Judge and there should not be any deviation. I have said so, so that the trial court Judges are appositely guided and refrain themselves from engaging in innovative creativity or "borrowed creativity" which has no sanction in law.

A criminal court while deciding criminal cases shall not be guided or influenced by the views or opinions expressed by the Judges on a private platform. The views or opinions expressed by the Judges, jurists, academicians, law teachers may be food for thought. Even the discussions or deliberations made on the State Judicial Academies or the National Judicial Academy at Bhopal, only update or open new vistas of knowledge of judicial officers. Criminal courts have to decide the cases before them examining the relevant facts and evidence placed before them, applying binding precedents. Judges' or academicians' opinions, predilection, fondness, inclination, proclivity on any subject, however eminent they are, shall not influence a decision-making process, especially when Judges are called upon to decide a criminal case which rests

only on the evidence adduced by the prosecution as well as by the defence and guided by settled judicial precedents. The National Judicial Academy and the State Judicial Academies should educate our judicial officers in this regard so that they will not commit such serious errors in future.

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79. INDIAN PENAL CODE, 1860 – Sections 406 and 420
CRIMINAL PROCEDURE CODE, 1973 – Section 202

i Civil dispute and criminal offence – Sometimes a case may apparently look to be of civil nature or may involve a commercial transaction but such civil disputes or commercial disputes in certain circumstances may also contain ingredients of criminal offence and such disputes have to be entertained notwithstanding they are also civil disputes.

ii For offence of cheating, it has to be shown that the intention of accused was dishonest at the time of making the promise, such dishonest intention cannot be inferred from a mere fact that the accused could not fulfill the promise subsequently.

Arun Bhandari v. State of Uttar Pradesh and others

Judgment dated 10.01.2013 passed by the Supreme Court in Criminal Appeal No. 78 of 2013, reported in 2013 2 SCC 801: 2013 1 Crimes 113 SC

Extracts from Judgment:

Before we proceed to scan and analyse the material brought on record in the case at hand, it is seemly to refer to certain authorities wherein the ingredients of cheating have been highlighted. In ***State of Kerala v. A. Pareed Pillai, AIR 1973 SC 326,*** a two-Judge Bench ruled that:

> "... To hold a person guilty of the offence of cheating, it has to be shown that his intention was dishonest at the time of making the promise [and] such a dishonest intention cannot be inferred from [a] mere fact that he could not subsequently fulfil the promise."

In ***G. V. Rao v. L.H.V. Prasad, 2000 3 SCC 693,*** this Court has held thus:

> "... As mentioned above, Section 415 has two parts. While in the first part, the person must 'dishonestly' or 'fraudulently' induce the complainant to deliver any property; in the second part, the person should intentionally induce the complainant to do or omit to do a thing. That is to say, in the first part, inducement must be dishonest or fraudulent. In the second part, the inducement should be intentional. As observed by this Court in ***Jaswantrai Manilal Akhaney v. State of Bombay, AIR 1956 SC 575,*** a guilty intention is an essential ingredient of the offence of cheating. In order, therefore, to secure conviction of a person for the

offence of cheating, 'mens rea' on the part of that person, must be established. It was also observed in ***Mahadeo Prasad v. State of W.B., AIR 1954 SC 724,*** that in order to constitute the offence of cheating, the intention to deceive should be in existence at the time when the inducement was offered."

In ***S. W. Palanitkar v. State of Bihar, AIR 2001 SC 2960,*** it has been laid down that:

"... In order to constitute an offence of cheating, the intention to deceive should be in existence at the time when the inducement was made. It is necessary to show that a person had fraudulent or dishonest intention at the time of making the promise, to say that he committed an act of cheating. A mere failure to keep up promise subsequently cannot be presumed as an act leading to cheating."

In the said case while dealing with the ingredients of criminal breach of trust and cheating, the Bench observed thus: ***S.W. Palanitkar case*** supra.

"... The ingredients in order to constitute a criminal breach of trust are: i entrusting a person with property or with any dominion over property, ii that person entrusted a dishonestly misappropriating or converting that property to his own use; or b dishonestly using or disposing of that property or wilfully suffering any other person so to do in violation i of any direction of law prescribing the mode in which such trust is to be discharged, ii of any legal contract made, touching the discharge of such trust.

"... The ingredients of an offence of cheating are: i there should be fraudulent or dishonest inducement of a person by deceiving him, ii a the person so deceived should be induced to deliver any property to any person, or to consent that any person shall retain any property; or b the person so deceived should be intentionally induced to do or omit to do anything which he would not do or omit if he were not so deceived; and iii in cases covered by, iib the act of omission should be one which cases or is likely to cause damage or harm to the person induced in body, mind, reputation or property."

At this stage, we may usefully note that sometimes a case may apparently look to be of civil nature or may involve a commercial transaction but such civil disputes or commercial disputes in certain circumstances may also contain ingredients of criminal offences and such disputes have to be entertained notwithstanding they are also civil disputes. In this context, we may reproduce a passage from ***Mohd. Ibrahim v. State of Bihar, 2009 8 SCC 751*** :

"... This Court has time and again drawn attention to the growing tendency of the complainants attempting to give the cloak of a criminal offence to matters which are essentially and purely civil in nature, obviously either to apply pressure on the accused, or out of enmity towards the accused, or to subject the accused to harassment. Criminal courts should ensure that proceedings before it are not used for settling score or to pressurise parties to settle civil disputes. But at the same time, it should be noted that several disputes of a civil nature may also contain the ingredients of criminal offences and if so, will have to be tried as criminal offences, even if they also amount to civil disputes. See ***G. Sagar Suri v. State of U.P., 2000 2 SCC 636*** and ***Indian Oil Corpn. v. NEPC India Ltd., 2006 6 SCC 736*** ".

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80. INDIAN PENAL CODE, 1860 – Sections 494 and 498-A

Right of private defence – It is not necessary for the accused to plead in so many words that he acted in self-defence – If the circumstances show that the right of private defence was legitimately exercised, it is open to the court to consider such a plea – The court shall presume the absence of such circumstances – It is for the accused to place necessary material on record either by himself adducing positive evidence or by eliciting necessary facts from the witnesses examined for the prosecution – Where the right of private defence is pleaded, the defence must be a reasonable and probable version satisfying the court that the harm caused by the accused was necessary for either warding off the attack or for forestalling the further reasonable apprehension from the side of the accused.

In a case of double murder, after the death of a member of his party the second deceased started to run away from the place of incident, chased by the accused persons, who inflicted lathi blows on his person – In such circumstances, the accused persons could not invoke the right of self-defence because reasonable apprehension had disappeared when accused noticed that he was running away from the scene in order to escape.

Gopal & Anr. v. State of Rajasthan

Judgment dated 18.01.2013 passed by the Supreme Court in Criminal Appeal No. 1156 of 2007, reported in 2013 CriLJ 1297

Extracts from Judgment:

The materials placed and relied on by the prosecution show that Rameshwar since deceased, Bodu Ram PW-7 and Bhagwan Sahai PW-8 had gone to the field of the appellants and there was a fight between both the groups. It is also clear that the appellants fought to repel the attack and in the course of

incident, both sides sustained injuries, as a result of which, Rameshwar died. In such circumstances, it would be possible for this Court to accept the claim of the appellants that since they were defending themselves, they had a right of private defence. In fact, the High Court has accepted the above stand.

Regarding the plea of private defence, it is useful to refer a decision of this Court in ***V. Subramani & Anr. v. State of T.N., AIR 2005 SC 1983.*** The following principles and conclusion are relevant:

> "The only question which needs to be considered is the alleged exercise of right of private defence. Section 96 IPC provides that nothing is an offence which is done in the exercise of the right of private defence. The section does not define the expression "right of private defence". It merely indicates that nothing is an offence which is done in the exercise of such right. Whether in a particular set of circumstances, a person legitimately acted in the exercise of the right of private defence is a question of fact to be determined on the facts and circumstances of each case. No test in the abstract for determining such a question can be laid down. In determining this question of fact, the court must consider all the surrounding circumstances. It is not necessary for the accused to plead in so many words that he acted in self-defence. If the circumstances show that the right of private defence was legitimately exercised, it is open to the court to consider such a plea. In a given case the court can consider it even if the accused has not taken it, if the same is available to be considered from the material on record. Under Section 105 of the Indian Evidence Act, 1872 in short "the Evidence Act", the burden of proof is on the accused, who sets up the plea of self- defence, and, in the absence of proof, it is not possible for the court to presume the truth of the plea of self-defence. The court shall presume the absence of such circumstances. It is for the accused to place necessary material on record either by himself adducing positive evidence or by eliciting necessary facts from the witnesses examined for the prosecution. An accused taking the plea of the right of private defence is not necessarily required to call evidence; he can establish his plea by reference to circumstances transpiring from the prosecution evidence itself. The question in such a case would be a question of assessing the true effect of the prosecution evidence, and not a question of the accused discharging any burden. Where the right of private defence is pleaded, the defence must

be a reasonable and probable version satisfying the court that the harm caused by the accused was necessary for either warding off the attack or for forestalling the further reasonable apprehension from the side of the accused. The burden of establishing the plea of self-defence is on the accused and the burden stands discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record. [See ***Munshi Ram v. Delhi Admn., AIR 1968 SC 702, State of Gujarat v. Bai Fatima, AIR 1975 SC 1478, State of U.P. v. Mohd. Musheer Khan, AIR 1977 SC 2226*** and ***Mohinder Pal Jolly v. State of Punjab, AIR 1979 SC 577***] Sections 100 to 101 define the extent of the right of private defence of body. If a person has a right of private defence of body under Section 97, that right extends under Section 100 to causing death if there is reasonable apprehension that death or grievous hurt would be the consequence of the assault. The oft-quoted observation of this Court in ***Salim Zia v. State of U.P., AIR 1979 SC 391*** runs as follows:

> "It is true that the burden on an accused person to establish the plea of self-defence is not as onerous as the one which lies on the prosecution and that while the prosecution is required to prove its case beyond reasonable doubt, the accused need not establish the plea to the hilt and may discharge his onus by establishing a mere preponderance of probabilities either by laying basis for that plea in the cross-examination of prosecution witnesses or by adducing defence evidence."

The accused need not prove the existence of the right of private defence beyond reasonable doubt. It is enough for him to show as in a civil case that the preponderance of probabilities is in favour of his plea."

Based on the above principles, in view of the discussion of the prosecution witnesses, viz., PWs 7, 8 and 10 coupled with the fact that the incident occurred in the field of the appellants, who also sustained injuries which is evident from the evidence of the doctor, who examined the injuries of Gopal (A-1 and Mahesh A-3-appellants herein, the stand of the appellants, as rightly argued by learned amicus curiae, is to be accepted. However, as per the prosecution story, not only Rameshwar but in the same incident Prabhat also died due to lathi blows inflicted by the appellants herein.

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81. INDIAN PENAL CODE, 1860 – Sections 499 and 500

Defamatory news – Editor's liability – The Editor controls the selection of the matter that is published – Editors have to take responsibility of everything they publish and to maintain the integrity of published record – So, if any defamatory news item is published in a newspaper, Editor is responsible for it.

Gambhir Sinh R. Dekare v. Falgun Bhai Chiman Bhai Patel and another

Judgment dated 11.03.2013 passed by the Supreme Court in Criminal Appeal No. 433 of 2013, reported in 2013 3 SCC 697

Extracts from Judgment:

A news item has the potentiality of bringing doomsday for an individual. The Editor controls the selection of the matter that is published. Therefore, he has to keep a careful eye on the selection. Blue-pencilling of news articles by anyone other than the Editor is not welcome in a democratic polity. Editors have to take responsibility of everything they publish and to maintain the integrity of published record. It is apt to remind ourselves the answer of the Editor of The Scotsman, a Scottish newspaper. When asked what it was like to run a national newspaper, the Editor answered "Run a newspaper! I run a country". It may be an exaggeration but it does reflect the well-known fact that it can cause far-reaching consequences in an individual and country's life.

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82. JUVENILE JUSTICE CARE & PROTECTION OF CHILDREN ACT, 2000 – Sections 2, 7 a and 68

JUVENILE JUSTICE CARE & PROTECTION OF CHILDREN RULES, 2007 – Rule 12 3 b

Determination of juvenility – Considerations therefor – As per Ossification Test, the accused was above 18 years of age from which age, two years could be subtracted – Date of birth given in Matriculation Certificate clearly indicated that he was below 18 years of age at the time of incident – Where Matriculation Certificate was available, ossification test was not required – Accused was held to be a juvenile.

Subham v. State of Madhya Pradesh

Judgment dated 14.02.2013 passed by the High Court of Madhya Pradesh in Criminal Revision No. 1053 of 2012, reported in 2013 CriLJ 1716

Extracts from Order:

In ossification test, if age of the accused is computed then, variation of two years may be considered on the lower side to assess as to whether he is a juvenile or not, whereas, age of the prosecutrix assessed by the ossification test, may be added by two years on upper side, so that the benefit of doubt may be given to the accused. However, age of any person, if it is computed by the

ossification test then, two years may be added or deleted, according to the other symptoms of that person and factual position of the case and therefore, it cannot be said that it is a hard and fast rule, by which age may be computed.

In the light of the judgments passed by Hon'ble the Apex Court in cases of ***Shahnawaz v. State of U.P. & Anr., AIR 2011 SC 3107*** and ***Ram Suresh Singh v. Prabhat Singh alias Chhotu Singh & Anr., AIR 2009 SC 2805*** and also, the computation which took place on the basis of Rule 12 3 a, the petitioner appears to be below 18 years of age at the time of the incident.

It appears that the learned Chief Judicial Magistrate decided the age of the petitioner being sentimental with the gravity of the crime alleged to have been committed by the petitioner. It is strange that in the order dated 07.05.2012, the learned Chief Judicial Magistrate did not discuss the date of birth of the petitioner, which was mentioned in the matriculation certificate, whereas on perusal of his order sheet dated 26.04.2012, such matriculation certificate was produced before him by Shyam Singh, father of the petitioner. Under such circumstances, where the matriculation certificate is available and the date of birth given in that certificate clearly indicates that the petitioner was below 18 years of age at the time of the incident then, nothing more could be seen at the time of assessment of his age. The learned Chief Judicial Magistrate has committed an error of law in the assessment of age done by the petitioner. Hence, it is a good case, in which interference is required from the side of this Court by way of a revision.

On the basis of the aforesaid discussion, the revision filed by the petitioner is hereby allowed. The order dated 07.05.2012, passed by the learned Chief Judicial Magistrate, Burhanpur and order dated 23.05.2012 passed by the learned Sessions Judge, Burhanpur are hereby set aside. It is declared that the petitioner Subham was a juvenile at the time of the incident. Therefore, his name may be removed from the trial which is pending before the Sessions Court. The SHO Police Station, Lalbag, District Burhanpur is directed to produce the charge-sheet against the petitioner before the concerned Juvenile Justice Board. The trial Court shall fix a date of appearance of the petitioner before the Juvenile Justice Board.

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83. JUVENILE JUSTICE CARE AND PROTECTION OF CHILDREN ACT, 2000 – Sections 2k, 7-A and 20
INDIAN PENAL CODE, 1860 – Section 302
EVIDENCE ACT, 1872 – Section 3

i Accused was convicted u/s 302/34 IPC – He put the claim of juvenility for the first time before High Court – The High Court held that at the time of alleged incident i.e. 9.10.1998 accused was not a juvenile under the 1986 Act.
The Supreme Court set aside the judgment of High Court in the light of Sections 2 k, 7-A and 20 of the Act of 2000 and held that the date of offence is the material date and the Act of 2000 will

be applicable even during the operation of the Act of 1986 by virtue of Section 20 of the 2000's Act.

ii Appreciation of evidence – A witness ran away to another place being afraid of the accused – If a witness ran away to another place because of threats issued by the accused person, it is no ground to disbelieve his evidence, more so, where his evidence is corroborated by other direct and circumstantial evidence.

Subodh Nath and Another v. State of Tripura

Judgment dated 19.03.2013 passed by the Supreme Court in Criminal Appeal No. 1551 of 2007, reported in 2013 4 SCC 122

Extracts from Judgment:

After the insertion of Section 7-A and the proviso and the Explanation to Section 20 in the 2000 Act, this Court delivered the judgment in ***Hari Ram v. State of Rajasthan, 2009 13 SCC 211.*** The facts of this case were that the accused committed the offences punishable under Sections 148, 302, 149, 325/149 and 323/149 IPC on 30-11-1998. The date of birth of the accused was 17-10-1982. The medical examination of the accused conducted by the Medical Board indicated his age to be between 16-17 years when he committed the offence on 30-11-1998. The High Court held that on the date of the incident the accused was about 16 years of age and was not a juvenile under the 2000 Act and the provisions of the 2000 Act were, therefore, not applicable to him. This Court set aside the order of the High Court and held that the accused had not attained the age of 18 years on the date of the commission of the offence and was entitled to the benefit of the 2000 Act, as if the provisions of Section 2 k thereof had always been in existence even during the operation of the 1986 Act by virtue of Section 20 of the 2000 Act as amended by the Amendment Act of 2006 and accordingly remitted the case of the accused to the Juvenile Justice Board, Ajmer, for disposal in accordance with law.

We are not persuaded by the learned counsel for the appellants to take a view that the evidence of PW 13 was not reliable as he was a suspect and had run away to Cachar. As has been explained by PW 13 himself, he left for Cachar because of his fear of the appellants who had threatened him with dire consequences if he disclosed the incident to anyone. At any rate, we find that the evidence of PW 13 is supported by the evidence of PW 6 who has stated that on the date of the incident he had found the deceased and the appellants grazing cows in Nalia Tilla at around 1.30 p.m. Moreover, the evidence of the investigating officer PW 19 read with the inquest report Ext.P-2 prepared by him shows that there were injuries on the dead body of the deceased caused by an axe and a gun. PW 19 has also stated that he recovered handle of the axe near the dead body of the deceased and he seized the handle of the axe after preparing a seizure list in the presence of the witnesses. Thus, the evidence of PW 13 is corroborated by material particulars by reliable testimony, direct and circumstantial.

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84. JUVENILE JUSTICE CARE & PROTECTION OF CHILDREN ACT, 2000 – Section 7-A

JUVENILE JUSTICE CARE & PROTECTION OF CHILDREN RULES 2007 – Rule 12

i The claim of juvenility can be raised for the first time before the Appellate Court or even the Supreme Court.

ii For making a claim with regard to juvenility after conviction, the claimant must produce some material which may prima facie satisfy the court that an inquiry into the claim of juvenility is necessary – What material may or may not be sufficient for the Court to prima facie record such satisfaction, discussed – Claim of juvenility lacking in credibility or frivolous claim of juvenility or patently absurd or inherently improbable claim of juvenility must be rejected by the court at threshold whenever raised.

Abuzar Hossain alias Gulam Hossain v. State of West Bengal

Judgment dated 10.10.2012 passed by the Supreme Court in Criminal Appeal No. 1193 of 2006, reported in AIR 2013 SC 1020

Extracts from Judgment:

A claim of juvenility may be raised at any stage even after final disposal of the case. It may be raised for the first time before this Court as well after final disposal of the case. The delay in raising the claim of juvenility cannot be a ground for rejection of such claim. The claim of juvenility can be raised in appeal even if not pressed before the trial court and can be raised for the first time before this Court though not pressed before the trial court and in appeal court.

For making a claim with regard to juvenility after conviction, the claimant must produce some material which may prima facie satisfy the court that an inquiry into the claim of juvenility is necessary. Initial burden has to be discharged by the person who claims juvenility.

As to what materials would prima facie satisfy the court and/or are sufficient for discharging the initial burden cannot be catalogued nor can it be laid down as to what weight should be given to a specific piece of evidence which may be sufficient to raise presumption of juvenility but the documents referred to in Rule 12 3ai to iii shall definitely be sufficient for prima facie satisfaction of the court about the age of the delinquent necessitating further inquiry under Rule 12. The statement recorded under Section 313 of the Code is too tentative and may not by itself be sufficient ordinarily to justify or reject the claim of juvenility. The credibility and/or acceptability of the documents like the school leaving certificate or the voters' list, etc. obtained after conviction would depend on the facts and circumstances of each case and no hard and fast rule can be prescribed that they must be prima facie accepted or rejected. In ***Akbar Sheikh and others v. State of West Bengal,2009 AIR SCW 3743*** and ***Pawan v. State Uttranchal, 2009 AIR SCW 217,*** these documents were not found prima facie credible while in ***Jitendra Singh @ Babbu Singh and another v. State of Uttar Pradesh, AIR 2011 AIR SCW 333*** the documents viz., school leaving certificate, mark-sheet and the

medical report were treated sufficient for directing an inquiry and verification of the appellant's age. If such documents prima facie inspire confidence of the court, the court may act upon such documents for the purposes of Section 7-A and order an enquiry for determination of the age of the delinquent.

An affidavit of the claimant or any of the parents or a sibling or a relative in support of the claim of juvenility raised for the first time in appeal or revision or before this Court during the pendency of the matter or after disposal of the case shall not be sufficient justifying an enquiry to determine the age of such person unless the circumstances of the case are so glaring that satisfy the judicial conscience of the court to order an enquiry into determination of age of the delinquent.

The court where the plea of juvenility is raised for the first time should always be guided by the objectives of the 2000 Act and be alive to the position that the beneficent and salutary provisions contained in 2000 Act are not defeated by hyper-technical approach and the persons who are entitled to get benefits of 2000 Act get such benefits. The courts should not be unnecessarily influenced by any general impression that in schools the parents/guardians understate the age of their wards by one or two years for future benefits or that age determination by medical examination is not very precise. The matter should be considered prima facie on the touchstone of preponderance of probability.

Claim of juvenility lacking in credibility or frivolous claim of juvenility or patently absurd or inherently improbable claim of juvenility must be rejected by the court at threshold whenever raised.

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85. LAND ACQUISITION ACT, 1894 – Sections 4 and 6
CIVIL PROCEDURE CODE, 1908 – Section 9
The Land Acquisition Act is a complete Code in itself and is meant to serve public purpose – By necessary implication the power of the civil Court to take cognizance of the case u/s 9 CPC stands excluded and a civil Court except by the High Court in a proceeding under Article 226 of the Constitution, has no jurisdiction to go into the question of the validity or legality of the notification u/s 4, declaration u/s 6 and subsequent proceedings – It is thus clear that the civil court is devoid of jurisdiction to give declaration or even bare injunction being granted on the invalidity of the procedure contemplated under the Act – The only right available for the aggrieved person is to approach the High Court under Article 226 and Supreme Court under Article 136 with self-imposed restrictions on their exercise of extraordinary power.

Commissioner, Bangalore Development Authority and another v. Brijesh Reddy and another

Judgment dated 08.02.2013 passed by the Supreme Court in Civil Appeal No. 1051 of 2013, reported in 2013 3 SCC 66

Extracts from Judgment:

In ***Laxmi Chand v. Gram Panchayat, Kararia, 1996 7 SCC 218*** while considering Section 9 of the Civil Procedure Code, 1908 vis-à-vis the Land Acquisition Act, 1894, this Court held as under:

> "2… It is seen that Section 9 of the Civil Procedure Code, 1908 gives jurisdiction to the Civil Court to try all civil suits, unless barred. The cognizance of a suit of civil nature may either expressly or impliedly be barred. The procedure contemplated under the Act is a special procedure envisaged to effectuate public purpose, compulsorily acquiring the land for use of public purpose. The notification under Section 4 and declaration under Section 6 of the Act are required to be published in the manner contemplated thereunder. The inference gives conclusiveness to the public purpose and the extent of the land mentioned therein. The award should be made under Section 11 as envisaged thereunder. The dissatisfied claimant is provided with the remedy of reference under Section 18 and a further appeal under Section 54 of the Act. If the Government intends to withdraw from the acquisition before taking possession of the land, procedure contemplated under Section 48 requires to be adhered to. If possession is taken, it stands vested under Section 16 in the State with absolute title free from all encumbrances and the Government has no power to withdraw from acquisition.
>
> 3. It would thus be clear that the scheme of the Act is complete in itself and thereby the jurisdiction of the civil court to take cognizance of the cases arising under the Act, by necessary implication, stood barred. The civil court thereby is devoid of jurisdiction to give declaration on the invalidity of the procedure contemplated under the Act. The only right an aggrieved person has is to approach the constitutional courts viz. the High Court and the Supreme Court under their plenary power under Articles 226 and 136 respectively with self-imposed restrictions on their exercise of extraordinary power. Barring thereof, there is no power to the civil court"

In ***Bangalore Development Authority v. K.S. Narayan, 2006 8 SCC 336*** which arose under the Bangalore Development Authority Act, 1976 and which was similar to the case on hand, this Court held that a civil suit is not maintainable to challenge the acquisition proceedings.

It is relevant to note that in the above decision in ***K.S. Narayan case*** supra the acquisition proceedings in question had been taken under the Bangalore Development Authority Act, 1976 and the provisions of Sections 17 and 19 are

somewhat similar to the provisions of Sections 4 and 6 of the Land Acquisition Act, 1894. After noting out all the details, this Court allowed the appeals and set aside the decision rendered by the High Court.

No doubt, in the case on hand, the plaintiffs approached the civil court with a prayer only for permanent injunction restraining Defendants 1 and 2 i.e. BDA, their agents, servants and anyone claiming through them from interfering with the peaceful possession and enjoyment of the schedule property. It is true that there is no challenge to the acquisition proceedings. However, in view of the assertion of BDA, in their written statements, about the initiation of acquisition proceedings ending with the passing of award, handing over possession and subsequent action, etc. the said suit is not maintainable. This was rightly concluded by the trial court. For proper compensation, the aggrieved parties are free to avail the statutory provisions and approach the court concerned. All these aspects have been clearly noted by the trial court and ultimately it rightly dismissed the suit as not maintainable. On the other hand, the learned Single Judge of the High Court though adverted to the principles laid down by this Court with reference to acquisition of land under the Land Acquisition Act and Section 9 CPC committed an error in remanding the matter to the trial court on the ground that the plaintiffs were not given opportunity to adduce evidence to show that their vendor was in possession which entitles them for grant of permanent injunction from evicting them from the scheduled property without due process of law by the defendants. In the light of the specific assertion coupled with materials in the written statement about the acquisition of land long ago and subsequent events, suit of any nature including bare injunction is not maintainable, hence, we are of the view that the High Court is not right in remitting the matter to the trial court for fresh disposal.

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86. MOTOR VEHICLES ACT, 1988 – Sections 140 and 149 2 a ii
Tribunal, while deciding the application u/s 140 of M.V. Act, exonerated insurance company for want of proper driving licence – It is not proper because it would frustrate the legislative object in introducing the concept of no fault liability.

Rajaram v. Kasaliya and others
Judgment dated 26.09.2011 passed by the High Court of Madhya Pradesh in M.A. No. 542 of 2011, reported in 2013 ACJ 598

Extracts from Judgment:

Keeping in view the law laid down in the matter of ***National Insurance Co. Ltd. v. Thaglu Singh, 1995 ACJ 248*** MP and also keeping in view the fact that offending vehicle was insured, this court is of the view that learned Tribunal committed error in exonerating the respondent No.8 at the initial stage of proceedings. If the respondent No.8 is exonerated at the initial stage while deciding the application under section 140 of the Motor Vehicles Act, then it would frustrate the legislative object in introducing the concept of no fault liability.

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87. MOTOR VEHICLES ACT, 1988 – Sections 166 and 167
WORKMEN'S COMPENSATION ACT, 1923 – Sections 8 and 10

S.167 of M.V. Act – A claimant can pursue his claim either under the M.V. Act or W.C. Act, 1923 but not both – Dependants accepted the amount paid as compensation awarded under W.C. Act in the proceedings initiated by the employer – Whether the acceptance of the aforesaid compensation would amount to the claimants having exercised their option, to seek compensation under the Workmen's Compensation Act, 1923 – Held, No.

The procedure under section 8 of W.C. Act aforesaid was initiated at the behest of the employer *suo motu*, therefore it cannot be considered as an exercise of option by the dependants/claimants to seek compensation under Workmen's Compensation Act, 1923.

Oriental Insurance Co. Ltd. v. Dyamavva and Others Judgment dated 05.02.2013 passed by the Supreme Court in C.A. No. 937 of 2013, reported in 2013 ACJ 709 SC

Extracts from Judgment:

..... "the Port Trust had initiated proceedings for paying compensation to the dependants of the deceased Yalgurdappa B. Goudar suo motu, under section 8 of the Workmen's Compensation Act, 1923. For the aforesaid purpose the Port Trust had deposited a sum of Rs. 3,26,140 with the Workmen's Compensation Commissioner on 4-11-2003.'' ..... "the Workmen's Compensation Commissioner by order dated 29-4-2004 directed the release of the amount of Rs. 3,26,140 to be shared by the widow of the deceased and his daughter in definite proportions".

The issue to be determined by us is, whether the acceptance of the aforesaid compensation would amount to the claimants having exercised their option, to seek compensation under the Workmen's Compensation Act, 1923. The procedure under section 8 aforesaid as noticed above is initiated at the behest of the employer suo motu, and as such, in our view cannot be considered as an exercise of option by the dependants/claimants to seek compensation under the provisions of the Workmen's Compensation Act, 1923. The position would have been otherwise, if the dependants had raised a claim for compensation under section 10 of Workmen's Compensation Act, 1923. In the said eventuality, certainly compensation would be paid to the dependants at the instance and option of the claimants. In other words, if the claimants had moved an application under section 10 of the Workmen's Compensation Act, 1923, they would have been deemed to have exercised their option to seek compensation under the provisions of the Workmen's Compensation Act. Suffice it to state that no such application was ever filed by the respondents-claimants herein under section 10 aforesaid. In the above view of the matter, it can be stated that the respondents-claimants having never exercised their option to seek compensation under section 10 of the Workmen's Compensation Act, 1923, could not be deemed to be precluded from seeking compensation under section

Even though the aforesaid determination concludes the issue in hand, ambiguity, if at all, can also be resolved in the present case, on the basis of the admitted factual position. The first act at the behest of the respondents-claimants for seeking compensation on account of the death of Yalgurdappa B. Goudar was by way of filing a claim petition under section 166 of the Motor Vehicles Act, 1988 on 30.5.2003. The aforesaid claim petition was the first claim for compensation raised at the hands of the respondents-claimants. If the question raised by the appellant has to be determined with reference to section 167 of the Motor Vehicles Act, 1988, the same is liable to be determined on the basis of the aforesaid claim application filed by respondents-claimants on 30.5.2003. The compensation deposited by the Port Trust with the Workmen's Compensation Commissioner for payment to the respondents-claimants was much later, on 4.11.2003. The aforesaid deposit, as already noticed above, was not at the behest of respondents–claimants, but was based on a unilateral suo motu determination of the employer the Port Trust under section 8 of the Workmen's Compensation Act. The first Participation of Dyamavva Yalgurdappa in the proceedings initiated by the Port Trust under the Workmen's Compensation Act, 1923, was on 20.4.2004. Having been summoned by the Workmen's Compensation Commissioner, she got her statement recorded before the Commissioner on 20.4.2004. But well before that date, she as well as the other claimants had already filed a claim petition under section 166 of the Motor Vehicles Act, 1988, on 30.5.2003. Filing of the aforesaid claim application under section 166 aforesaid, in our view, constitutes her as well as that of the other dependants of the deceased option to seek compensation under Motor vehicles Act, 1988. The instant conclusion would yet again answer the question raised by the appellant herein, under section 167 of the Motor Vehicles Act, 1988, in the same manner as has already been determined above.

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88. MOTOR VEHICLES ACT, 1988 – Sections 166 and 173
Accident claim – Contributory negligence – Apportionment of liability – A truck had been parked on a road without any indication at mid-night – A Motorcyclist crashed into the truck and died – Tribunal held that the truck-driver and deceased motorcyclist were responsible for the accident in the ratio of 50:50 – High Court held deceased responsible only to the extent of 25% .

Kamla Rajput and others v. Vijay Singh Gujar and Others

Judgment dated 13.12.2011 passed by the High Court of Madhya Pradesh in M.A. No. 337 of 2008, reported in 2013 ACJ 967

Extracts from Judgment:

The truck bearing registration no. MP 07-G-4315 was standing on a road in the midnight. When the deceased was driving the motor cycle, it dashed the said truck which was standing without any signal. In such a case, the finding of contributory negligence to the extent of 50 per cent is unreasonable. In the opinion of this court, the deceased may be held responsible only to the extent

of 25%, particularly when the truck was standing without any signal in the midnight. In such circumstances, the finding of contributory negligence is modified to the above said extent.

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89. N.D.P.S. ACT, 1985 – Sections 20bii and 50

i Section 50 of the Act applies only to search of vehicles scooters etc. and not to search of persons.

ii There is no set format prescribe in the Act for a notice u/s 50 – The essence of the matter is that the accused should be apprised of his legal right of being searched either by a Gazetted Officer or a Magistrate.

iii Since, minimum sentence is prescribed by the Act and provisions do not permit the Court to award a sentence lesser than the minimum prescribed, the Supreme Court did not modify the minimum sentence.

Navdeep Singh v. State of Haryana

Judgment dated 09.01.2013 passed by the Supreme Court in Criminal Appeal No. 970 of 2011, reported in 2013 2 SCC 584

Extracts from Order:

We have carefully perused the provisions of Section 50 of the Act. In our opinion, it may not be necessary to extract the whole provision. The trial court and the High Court have noticed the aforesaid submission made before us, at length. On marshalling of facts and appreciation of evidence, they have reached the conclusion that what was searched is the scooter and not the person of the appellant and, therefore, the provisions of Section 50 of the Act would not apply to the present case. We have also looked into the notice issued to the appellant by PW 3, the investigation officer, before the search was made and we note that a substantial question was put across the appellant as to whether he chooses to be searched by a gazetted officer or a Magistrate. The appellant accorded his consent to be searched by a gazetted officer. In fact, the appellant and the scooter were searched by a gazetted officer as per his request.

In our opinion, the provisions do not prescribe any set format for such notice. The essence is to apprise the accused of his legal right of being searched either by a gazetted officer or a Magistrate. Here, when the appellant was apprised of his statutory rights under Section 50 by PW 3 and he opted to be searched by a gazetted officer, then he has, by necessary implication, consciously exercised his right. In that view of the matter, we cannot accept the submission of the learned counsel for the appellant that the mandatory provisions of Section 50 of the Act were breached.

As per the amended provision of Section 20 of the Act, the minimum sentence that can be awarded, if there exists an order of conviction under the Act, is ten years and the said term was rightly awarded by the trial court and confirmed by the High Court. We cannot modify the sentence, since the provisions

do not permit this Court to award a punishment less than what is prescribed under the Act. In that view of the matter, the aforementioned contention of the learned counsel cannot be accepted by us.

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90. N.D.P.S. ACT, 1985 – Sections 79 and 80
CRIMINAL PROCEDURE CODE, 1973 – Sections 24, 207 and 293
The Supreme Court has issued directions and guidelines for trials of NDPS Act cases pertaining to a adjournments, b examination of witnesses, c workload in Courts d narcotics laboratories, e shortage of staff in narcotics laboratories, f right of re-testing samples, g monitoring for progress of investigation and trial, h public prosecutors, i compliance of section 207 of Cr.P.C.

a Adjournments – The Supreme Court directs that no special Court would grant adjournments at the request of a party except where the circumstances are beyond the control of the party – Where the date of hearing has been fixed as per the convenience of the counsel, no adjournment shall be granted without exception.

b Examination of witnesses – The Supreme Court directs the Courts concerned to adopt the method of "sessions trials" and assign block dates for examination of witnesses and taking evidence of official witnesses, who are covered by section 293 Cr.P.C, in the form of affidavits.

c Workload in Courts – Each State, in consultation with the High Court, is directed to establish special Courts which would deal exclusively with offences under the Act – The number of these Courts must be proportionate to, and sufficient for, handling the volume of pending cases in the State.
Till exclusive Courts for the purpose of disposing of NDPS cases under the Act are established, these cases will be prioritized over all other matters.

d Narcotics laboratories – The Supreme Court directs that the Central Government must ensure equal access to CFSLs from different parts of the country – Besides the three in the pipeline, more CFSLs must be established, especially to cater to the needs of southern and eastern parts of the country – Analogous directions are issued to the State to establish State level and Regional level Forensic Science Laboratories.

e Shortage of staff in narcotics laboratories – The Supreme Court directs the Directorate of Forensic Science Services, Ministry of Home Affairs to address the shortage of staff on an urgent basis.

f Right of re-testing samples – The Act itself does not permit re-sampling or re-testing of samples – It is imperative to define re-testing rights.

Any request as to re-testing/re-sampling shall not be entertained under the Act as a matter of course – These may, however be permitted, in extremely exceptional circumstances, for cogent reasons to be recorded by the Judge – An application in such rare cases must be made within a period of 15 days of the receipt of test report, no application for re-testing/re-sampling shall be entertained thereafter – However, in the absence of any compelling circumstances, any form of re-testing/re-sampling is strictly prohibited under the Act.

g **Monitoring for progress of investigation and trial – Nodal officers be appointed in all the departments dealing with the NDPS cases, for monitoring the progress of investigation and trial – The Nodal Officers must be equivalent or superior to the rank of Superintendent of Police, who shall ensure that the trial is not delayed on account of non-supply of documents, non-availability of the witnesses or for any other reasons.**

h **Public Prosecutors – The District and Sessions Judge shall make recommendations for appointment of Public Prosecutors in consultation with the Administrative Judge/Portfolio Judge/ Inspecting Judge, in-charge of looking after the administration of the Sessions division concerned.**

i **Compliance of section 207 of Cr.P.C. – Filing of the charge-sheet and supply of other documents must also be provided in electronic form – However, this direction must not be treated as a substitute for hard copies of the same which are indispensable for Court proceedings.**

Thana Singh v. Central Bureau of Narcotics

Judgment dated 23.01.2013 passed by the Supreme Court in Criminal Appeal No. 1640 of 2010, reported in 2013 2 SCC 590

Extracts from Order :

The lavishness with which adjournments are granted is not an ailment exclusive to narcotics trials; courts at every level suffer from this predicament. The institutionalization of generous dispensation of adjournments is exploited to prolong trials for varied considerations.

Such a practice deserves complete abolishment. The legislature enacted a crucial amendment in the form of a fourth proviso to Section 3092 of the Code of Criminal Procedure, 1973 [through Section 21b of Act 5 of 2009] to tackle the problem, but the same awaits notification. Once notified, Section 309 will read as follows: Section reproduced

> ***"309. Power to postpone or adjourn proceedings.***– 1 In every inquiry or trial, the proceedings shall be held as expeditiously as possible, and in particular, when the examination of witnesses has once begun, the same shall be continued from day to day until all the witnesses in

attendance have been examined, unless the court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded.

2 If the court, after taking cognizance of an offence, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody:

Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time:

Provided further that when witnesses are in attendance, no adjournment or postponement shall be granted, without examining them, except for special reasons to be recorded in writing:

Provided also that no adjournment shall be granted for the purpose only of enabling the accused person to show cause against the sentence proposed to be imposed on him:

Provided also that–

a no adjournment shall be granted at the request of a party, except where the circumstances are beyond the control of that party:

b the fact that the pleader of a party is engaged in another court, shall not be a ground for adjournment:

c Where a witness is present in court but a party or his pleader is not present or the party or his pleader though present in court, is not ready to examine or cross-examine the witness, the court may, if it thinks fit, record the statement of the witness and pass such orders as it thinks fit dispensing with the examination-in-chief or cross-examination of the witness, as the case may be.

Explanation 1. – If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand.

Explanation 2. – The terms on which an adjournment or postponement may be granted include, in appropriate cases, the payment of costs by the prosecution or the accused."

The fourth proviso deserves immediate notification. In lieu of the lacuna created by its conspicuous absence, which is interfering with the fundamental right of speedy trial [see ***Hussainara Khatoon 1 v. State of Bihar, 1980 1 SCC 81***], something this Court is duty-bound to protect and uphold, and till the statutory provisions are in place, we direct that no NDPS court would grant adjournments at the request of a party except where the circumstances are beyond the control of the party. This exception must be treated as an exception, and must not be allowed to swallow the generic rule against grant of adjournments. Further, where the date for hearing has been fixed as per the convenience of the counsel, no adjournment shall be granted without exception. Adherence to this principle would go a long way in cutting short that queue to the doors of justice.

It would be prudent to return to the erstwhile method of holding "sessions trials" i.e. conducting examination and cross-examination of a witness on consecutive days over a block period of three to four days. This permits a witness to take the stand after making one-time arrangements for travel and accommodation, after which, he is liberated from his civil duties qua a particular case. Therefore, this Court directs the courts concerned to adopt the method of "sessions trials" and assign block dates for examination of witnesses.

The Narcotics Control Board also pointed out that since operations for prevention of crimes related to narcotic drugs and substances demands coordination of several different agencies viz. Central Bureau of Narcotics CBN, Narcotics Control Bureau NCB, Department of Revenue Intelligence DRI, Department of Customs and Central Excise, State Law Enforcement Agency, State Excise Agency to name a few, procuring attendance of different officers of these agencies becomes difficult. On the completion of investigation for instance, investigating officers return to their parent organizations and are thus, often unavailable as prosecution witnesses. In the light of the recording of such official evidence, we direct the courts concerned to make most of Section 293 of the Code of Criminal Procedure, 1973 and save time by taking evidence from official witnesses in the form of affidavits.

The courts are unduly overburdened, an outcome of the diverse repertoire of cases they are expected to handle. We are informed by the Narcotics Control Board that significant time of the NDPS Court is expended in dealing with bail and other criminal matters. Besides, many States do not even have the necessary NDPS courts to deal with the volume of NDPS cases.

Narcotics laboratories at the national level identify drugs for abuse and their accompanying substances in suspected samples, determine the purity and the possible origin of illicit drugs, carry out drug-related research, particularly on new sources of drugs liable to abuse, and when required by the police or courts of law, provide supportive expertise in drug trafficking cases. Their role in the effective implementation of the mandate of the NDPS Act is indispensable which is why every State or region must have proximate access to these laboratories so that samples collected for the purposes of the Act may be sent on a timely basis to them for scrutiny. These samples often from primary and

clinching evidence for both the prosecution and the defense, making their evaluation by narcotics laboratories a crucial exercise.

The NDPS Act itself does not permit re-sampling or re-testing of samples. Yet, there has been a trend to the contrary; NDPS Courts have been consistently obliging to applications for re-testing and re-sampling. These applications add to delays as they are often received at advanced stages of trials after significant elapse of time. NDPS Courts seem to be permitting re-testing nonetheless by taking resort to either some High Court judgments [see ***State of Kerala v. Deepak P. Shah, 2001 Cri LJ 2690 Ker*** and ***Nihal Khan v. State Govt. of NCT of Delhi, 2007 Cri LJ 2074 Del***] or perhaps to Sections 79 and 80 of the NDPS Act which permit application of the Customs Act, 1962 and the Drugs and Cosmetics Act, 1940. While re-testing may be an important right of an accused, the haphazard manner in which the right is imported from other legislations without its accompanying restrictions, however, is impermissible. Under the NDPS Act, re-testing and re-sampling is rampant at every stage of the trial contrary to other legislations which define a specific time-frame within which the right may be available. Besides, reverence must also be given to the wisdom of the legislature when it expressly omits a provision, which otherwise appears as a standard one in other legislations. The legislature, unlike for the NDPS Act, enacted Section 254 of the Drugs and Cosmetics Act, 1940, Section 132 of the Prevention of Food Adulteration Act, 1954 and Rule 56 of the Central Excise Rules, 1944, permitting a time period of thirty, ten and twenty days respectively for filing an application for re-testing.

Hence, it is imperative to define re-testing rights, if at all, as an amalgamation of the abovestated factors. Further, in the light of Section 52-A of the NDPS Act, which permits swift disposal of some hazardous substances, the time-frame within which any application for re-testing may be permitted, ought to be strictly defined.

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91. PRE-CONCEPTION AND PRE-NATAL DIAGNOSTIC TECHIQUES PROHIBITION OF SEX SELECTION ACT, 1994 – Sections 3 to 7 and 9 MEDICIAL TERMINATION OF PREGNANCY ACT, 1971 – Sections 3 to 5 To control discrimination towards the female child and practice of eliminating female foetus, Hon'ble Supreme Court has issued guidelines as following :-

i The Central Supervisory Board and the State and Union Territories Supervisory Boards, constituted u/s 7 and 16-A of PC & PNDT Act, would meet at least once in six months, so as to supervise and oversee how effective is the implementation of the PC & PNDT Act.

ii The State Advisory Committees and the District Advisory Committees should gather information relating to the breach of the provisions of the PC & PNDT Act and the Rules and take steps to seize records, seal machines and institute legal

proceedings, if they notice violation of the provisions of PC & PNDT Act.

iii **The committees mentioned above should report the details of the charges framed and the conviction of the persons who have committed the offence, to the State Medical Councils for proper action, including suspension of the registration of the unit and cancellation of licence to practice.**

The authorities should ensure also that all genetic counselling centres, genetic laboratories and genetic clinics, infertility clinics, scan centres etc. using pre-conception and pre-natal diagnostic techniques and procedures should maintain all records and all forms, required to be maintained under the Act and the Rules and the duplicate copies of the same be sent to the district authorities concerned, in accordance with Rule 98 of the Rules.

iv **States and District Advisory Boards should ensure that all manufacturers and sellers of ultrasonography machines do not sell any machine to any unregistered centre, as provided under Rule 3-A and disclose, on a quarterly basis, to the State/Union Territory concerned and the Central Government, a list of persons to whom the machines have been sold, in accordance with Rule 3-A 2 of the Rules.**

v **There will be a direction to all genetic counselling centres, genetic laboratories and genetic clinics, etc. to maintain forms A, E, H and other statutory forms provided under the Rules and if these forms are not properly maintained, appropriate action should be taken by the authorities concerned.**

vi **Steps should also be taken by the State Government and the authorities under the Act for mapping of all registered and unregistered ultrasonography clinics, in three months time.**

vii **Steps should be taken by the State Government and the Union Territories to educate the people of the necessity of implementing the provisions of the Act by conducting workshops as well as awareness camps at the State and district levels.**

viii **Special cell be constituted by the State Government and the Union Territories to monitor the progress of various cases pending in the Courts under the Act and take steps for their early disposal.**

ix **The authorities concerned should take steps to seize the machines which have been used illegally and contrary to the provisions of the Act and the Rules thereunder and the seized machines can also be confiscated under the provisions of the Code of Criminal Procedure and be sold, in accordance with law.**

x **The various Courts in this country should take steps to dispose of all the pending cases under the Act, within a period of six months – Communicate this order to the Registrars of various High Courts, who will take appropriate follow-up action with due intimation to the Courts concerned.**

Voluntary Health Association of Punjab v. Union of India and others

Judgment dated 04.03.2013 passed by the Supreme Court in Writ petition c No. 349 of 2006, reported in 2013 4 SCC 1

Extracts from Judgment:

Be it noted, this is not for the first time that this Court is showing its concern. It has also been done before. In ***Centre for Enquiry into Health and Allied Themes v. Union of India, 2001 5 SCC 577,*** the two-Judge Bench commenced the judgment stating that:

> "... the practice of female infanticide still prevails despite the fact that the gentle touch of a daughter and her voice has a soothing effect on the parents."

The Court also commented on the immoral and unethical part of it as well as on the involvement of the qualified and unqualified doctors or compounders to abort the foetus of a girl child. It is apposite to state here that certain directions were given in the said decision.

On many an occasion this Court has expressed its anguish over this problem in many a realm. Dealing with the unfortunate tradition of demand of dowry from the girl's parents at the time of marriage despite the same being a criminal offence, a two-Judge Bench in ***State of H.P. v. Nikku Ram, 1995 6 SCC 219*** has expressed its agony thus:

> "Dowry, dowry and dowry. This is the painful repetition which confronts, and at times haunts, many parents of a girl child in this holy land of ours where, in good old days the belief was : 'यत्र नार्यस्तु पूज्यन्ते रमन्ते तत्र देवताः' ['Yatra naryastu Pujyante ramante tatra dewatah'] where woman is worshipped, there is abode of God. We have mentioned about dowry thrice, because this demand is made on three occasions: i before marriage; ii at the time of marriage; and iii after the marriage. Greed being limitless, the demands become insatiable in many cases, followed by torture on the girl, leading to either suicide in some cases or murder in some."

The aforesaid passage clearly reflects the degree of anguish of this Court in regard to the treatment meted out to the women in this country.

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92. PREVENTION OF CORRUPTION ACT, 1988 – Sections 7 and 13
PROBATION OF OFFENDERS ACT, 1958 – Section 4
Whether the Probation of Offender Act, 1958 is applicable to offence under the Prevention of Corruption Act? Held, No – In cases where a specific provision prescribes a minimum sentence, the provision of the Probation of Offender Act cannot be invoked.

Shyam Lal Verma v. Central Bureau of Investigation

Judgment dated 21.01.2013 passed by Supreme Court in Criminal Appeal No. 171 of 2013, reported in 2013 1 Crimes 317 SC

Extracts from Judgment:

It is not in dispute that the issue raised in this appeal has been considered by this Court in ***State Through SP, New Delhi v. Ratan lal Arora, 2004 4 SCC 590*** wherein in similar circumstances, this Court held that since Section 7 as well as Section 13 of the Prevention of Corruption Act provide for a minimum sentence of six months and one year respectively in addition to the maximum sentences as well as imposition of fine, in such circumstances claim for granting relief under the Probation of Offenders Act is not permissible. In other words, in cases where a specific provision prescribed a minimum sentence, the provisions of the Probation Act cannot be invoked. Similar view has been expressed in ***State Represented by Inspector of Police, Pudukottai, T.N. v. A. Parthiban, 2006 11 SCC 473*** .

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93. PREVENTION OF CORRUPTION ACT, 1988 – Section 19
Sanction for prosecution – Section 19 of the Act – Expression "Removal from his office" – Connotation of – The power to repatriate, a Government servant, does not embrace within itself the power of removal from office – The term removal means the act of removing from the office or putting an end to an employment – So repatriation is not removal from office – An authority empowered to repatriate a Government servant, cannot grant sanction for prosecution.

State of Uttarakhand v. Yogendra Nath Arora

Judgment dated 18.03.2013 passed by Supreme Court in Criminal Appeal No. 459 of 2013, reported in 2013 2 Crimes 79 SC

Extracts from Judgment:

The question which falls for determination is as to whether the expression removal from his office would mean dislodging him from holding that office and shifting him to another office. In other words, the power of the State Government of Uttarakhand to repatriate the accused would mean that it has power to remove. In our opinion, office means a position which requires the person holding it to perform certain duties and discharge certain obligations and removal from his office would mean to snap that permanently. By repatriation, the person holding the office on deputation may not be required to perform that duty and discharge the obligation of that office, but nonetheless he continues to hold office and by

virtue thereof performs certain other duties and discharge certain other obligations. Therefore, the power to repatriate does not embrace within itself the power of removal from office as envisaged under Section 19 1 c of the Act. The term removal means the act of removing from office or putting an end to an employment. The distinction between dismissal and removal from service is that former ordinarily disqualifies from future employment but the latter does not.

The view which we have taken finds support from the decision of this Court in the case of ***V.K. Sharma v. State Delhi Admn., 1975 1 SCC 784*** in which it has been held as follows.

> "….. The purport of taking the sanction from the authority competent to remove a corrupt government servant from his office is not only to remove him from his temporary office but to remove him from government service"

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94. SPECIFIC RELIEF ACT, 1963 – Section 6
CIVIL PROCEDURE CODE, 1908 – Order 39 Rule 1

i Suit for possession – Grant of interim relief – Principles to be followed – Interim reliefs which amount to pre-trial decrees must be avoided wherever possible.

ii Mandatory Interim relief – Grant of mandatory interim relief requires the highest degree of satisfaction of the Court; much higher than a case involving grant of prohibitory injunction.

Mohd. Mehtab Khan & Ors. v. Khushnuma Ibrahim & Ors.
Judgment dated 24.01.2013 passed by the Supreme Court in Civil Appeal No. 678 of 2012, reported in AIR 2013 SC 1099

Extracts from Judgment:

While the bar under Section 63 of the SRSpecific Relief Act may not apply to the instant case in view of the initial forum in which the suit was filed and the appeal arising from the interim order being under the Letters Patent issued to the Bombay High Court, as held by a Constitution Bench of this Court ***P.S. Sathappan Dead by L.Rs. v. Andhra Bank Ltd. & Ors., AIR 2004 SC 5152,*** what is ironical is that the correctness of the order passed in respect of the interim entitlement of the parties has reached this Court under Article 136 of the Constitution. Ordinarily and in the normal course, by this time, the suit itself should have been disposed of. Tragically, the logical conclusion to the suit is nowhere in sight and it is on account of the proverbial delays that have plagued the system that interim matters are being contested to the last court with the greatest of vehemence and fervor. Given the ground realities of the situation it is neither feasible nor practical to take the view that interim matters, even though they may be inextricably connected with the merits of the main suit, should always be answered by maintaining a strict neutrality, namely, by a refusal to adjudicate. Such a stance by the courts is neither feasible nor practicable. Courts,

therefore, will have to venture to decide interim matters on consideration of issues that are best left for adjudication in the full trial of the suit. In view of the inherent risk in performing such an exercise which is bound to become delicate in most cases the principles that the courts must follow in this regard are required to be stated in some detail though it must be made clear that such principles cannot be entrapped within any straitjacket formula or any precise laid down norms. Courts must endeavor to find out if interim relief can be granted on consideration of issues other than those involved in the main suit and also whether partial interim relief would satisfy the ends of justice till final disposal of the matter. The consequences of grant of injunction on the defendant if the plaintiff is to lose the suit along with the consequences on the plaintiff where injunction is refused but eventually the suit is decreed has to be carefully weighed and balanced by the Court in every given case. Interim reliefs which amount to pre-trial decrees must be avoided wherever possible. Though experience has shown that observations and clarifications to the effect that the findings recorded are prima facie and tentative meant or intended only for deciding interim the findings on issues concerning the main suit has had a telling effect in entitlement of the parties have not worked well and interim process of final adjudication it is here that strict exercise of judicial discipline will be of considerable help and assistance. The power of self-correction and comprehension of the orders of superior forums in the proper perspective will go a long way in resolving the dangers inherent in deciding an interim matter on issues that may have a close connection with those arising in the main suit.

There is yet another dimension to the issues arising in the present appeal. The interim relief granted to the plaintiffs by the Appellate Bench of the High Court in the present case is a mandatory direction to handover possession to the plaintiffs. Grant of mandatory interim relief requires the highest degree of satisfaction of the Court; much higher than a case involving grant of prohibitory injunction. It is, indeed, a rare power, the governing principles whereof would hardly require a reiteration inasmuch as the same which had been evolved by this Court in ***Dorab Cawasji Warden v. Coomi Sorab Warden and Others, AIR 1990 SC 867*** has come to be firmly embedded in our jurisprudence.

Paras of the judgment in ***Dorab Cawasji Warden*** supra, extracted below, may be usefully remembered in this regard:

> "The relief of interlocutory mandatory injunctions are thus granted generally to preserve or restore the status quo of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining. But since the granting of such an injunction to a party who fails or would fail to establish his right at the trial may cause great injustice

or irreparable harm to the party against whom it was granted or alternatively not granting of it to a party who succeeds or would succeed may equally cause great injustice or irreparable harm, courts have evolved certain guidelines. Generally stated theses guidelines are:

1 The plaintiff has a strong case for trial. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction.

2 It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money.

3 The balance of convenience is in favour of the one seeking such relief.

Being essentially an equitable relief the grant or refusal of an interlocutory mandatory injunction shall ultimately rest in the sound judicial discretion of the court to be exercised in the light of the facts and circumstances in each case. Though the above guidelines are neither exhaustive nor complete or absolute rules, and there may be exceptional circumstances needing action, applying them as prerequisite for the grant or refusal of such injunctions would be a sound exercise of a judicial discretion."

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95. SPECIFIC RELIEF ACT, 1963 – Section 26
CIVIL PROCEDURE CODE, 1908 – Order 6 Rule 4
EVIDENCE ACT, 1872 – Sections 61, 62, 63 and 64

i Section 26 of the Specific Relief Act has a limited application, and is applicable only where it is pleaded and proved that through fraud or mutual mistake of the parties, the real intention of the parties is not expressed in relation to an instrument – Such rectification is permissible only by the parties to the instrument and by none others.

ii Effect of failure to plead "undue influence" – If there are facts on the record to justify the inference of undue influence, the omission to make a specific allegation, is not fatal to the plaintiff but the Court has to see that no surprise is caused to the defendant.

iii There is a difference between admissibility of a document and its probative value – A document may be admissible and yet may not carry any conviction and weight or its probative value may be nil.

Joseph John Peter Sandy v. Veronica Thomas Rajkumar and Another

Judgment dated 12.03.2013 passed by the Supreme Court in Civil Appeal No. 2178 of 2004, reported in 2013 3 SCC 801

Extracts from Judgment:

In ***Subhadra v. Thankam, AIR 2010 SC 3031*** this Court while deciding upon whether the agreement suffers from any ambiguity and whether rectification is needed, held that when the description of the entire property has been given and in the face of the matters being beyond ambiguity,

> "the question of rectification in terms of Section 26 of the Act would, thus, not arise. The provisions of Section 26 of the Act would be attracted in limited cases. The provisions of this section do not have a general application. These provisions can be attracted in the cases only where the ingredients stated in the section are satisfied. The relief of rectification can be claimed where it is through fraud or a mutual mistake of the parties that real intention of the parties is not expressed in relation to an instrument".

A similar view has been reiterated by this Court in ***State of Karnataka v. K.K. Mohandas, AIR 2007 SC 2917*** **.**

If there are facts on the record to justify the inference of undue influence, the omission to make an allegation of undue influence specifically, is not fatal to the plaintiff being entitled to relief on that ground; all that the court has to see is that there is no surprise to the defendant. In ***Hari Singh v. Kanhaiya Lal, AIR 1999 SC 3325*** it was held that mere lack of details in the pleadings cannot be a ground to reject a case for the reason that it can be supplemented through evidence by the parties.

Admissibility of a document

In ***State of Bihar v. Radha Krishna Singh, AIR 1983 SC 684*** this court held as under:

> "… Admissibility of a document is one thing and its probative value quite another–these two aspects cannot be combined. A document may be admissible and yet may not carry any conviction and weight or its probative value may be nil.…
>
> … where a report is given by a responsible officer, which is based on evidence of witnesses and document and has a statutory flavour in that it is given not merely by an administrative officer but under the authority of a statute, its probative value would indeed be very high so as to be entitled to great weight.

> The probative value of documents which, however ancient they may be, do not disclose sources of their information or have not achieved sufficient notoriety is precious little."

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96. TRANSFER OF PROPERTY ACT, 1882 – Sections 108, 111 and 116
LIMITATION ACT, 1963 – Article 58
SPECIFIC RELIEF ACT, 1963 – Sections 34 and 38

i A suit for declaration that the termination of the lease was invalid, should be brought within 3 years from alleged termination – For such suit, it is not necessary that the lessee be dispossessed from leased property.

ii What is right to sue?

iii Relief of declaration under the Specific Relief Act is discretionary in nature – A civil Court can and may, in appropriate cases, refuse to grant declaratory decree for good and valid reasons, which dissuade the Court from exercising its discretionary jurisdiction.

Board of Trustees of Port of Kandla v. Hargovind Jasraj and another

Judgment dated 09.01.2013 passed by the Supreme Court in Civil Appeal No. 153 of 2013, reported in 2013 3 SCC 182

Extracts from Judgment:

The expression "right to sue" has not been defined. But the same has on numerous occasions fallen for interpretation before the courts. In ***State of Punjab v. Gurdev Singh, 1991 4 SCC 1,*** the expression was explained as under:

> "… The words 'right to sue' ordinarily mean the right to seek relief by means of legal proceedings. Generally, the right to sue accrues only when the cause of action arises, that is, the right to prosecute to obtain relief by legal means. The suit must be instituted when the right asserted in the suit is infringed or when there is a clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted…"

References may be made to the decisions of this Court in ***Kharti Hotels P Ltd. v. Union of India, 2011 9 SCC 126*** wherein this Court observed:

> "While enacting Article 58 of the 1963 Act, the legislature has designedly made a departure from the language of Article 120 of the 1908 Act. The word 'first' has been used between the words 'sue' and 'accrued'. This would mean that if a suit is based on multiple causes of action, the period of limitation will begin to run from the date when the right to

> sue first accrues. To put it differently, successive violation of the right will not give rise to fresh cause and the suit will be liable to be dismissed if it is beyond the period of limitation counted from the day when the right to sue first accrued."

The right to sue in the present case first accrued to the lessee on 13-12-1978 when in terms of order dated 8-8-1977 the lease in favour of the lessee was terminated. A suit for declaration that the termination of the lease was invalid hence ineffective for any reason including the reason that the person on whose orders the same was terminated had no authority to do so, could have been instituted by the lessee on 14-12-1978. For any such suit it was not necessary that the lessee was dispossessed from the leased property as dispossession was different from termination of the lease. But even assuming that the right to sue did not fully accrue till the date the lessee was dispossessed of the plot in question, such a dispossession having taken place on 14-12-1978, the lessee ought to have filed the suit within three years of 15-12-1978 so as to be within the time stipulated under Article 58 extracted above. The suit in the instant case was, however, instituted in the year 1996 i.e. after nearly eighteen years later and was, therefore, clearly barred by limitation. The courts below fell in error in holding that the suit was within time and decreeing the same in whole or in part.

It is true that in some of the above cases, this Court was dealing with proceedings arising under Article 226 of the Constitution, exercise of powers whereunder is discretionary but then grant of declaratory relief under the Specific Relief Act is also discretionary in nature. A civil court can and may in appropriate cases refuse a declaratory decree for good and valid reasons which dissuade the court from exercising its discretionary jurisdiction. Merely because the suit is within time is no reason for the court to grant a declaration. Suffice it to say that filing of a suit for declaration was in the circumstances essential for the plaintiffs. That is precisely why the plaintiffs brought a suit no matter beyond the period of limitation prescribed for the purpose. Such a suit was neither unnecessary nor a futility for the plaintiff's right to remain in possession depended upon whether the lease was subsisting or stood terminated. It is not, therefore, possible to fall back upon the possessory rights claimed by the plaintiffs over the leased area to bring the suit within time especially when we have, while dealing with the question of possession, held that possession also was taken over pursuant to the order of termination of the lease in question.

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NOTE : * Asterisk denotes short notes

PART - IV

IMPORTANT CENTRAL/STATE ACTS & AMENDMENTS

THE CRIMINAL LAW AMENDMENT ACT, 2013

No. 13 of 2013

[2nd April, 2013]

An Act further to amend the Indian Penal Code, the Code of Criminal Procedure, 1973, the Indian Evidence Act, 1872 and the Protection of Children from Sexual Offences Act, 2012.

Be it enacted by Parliament in the Sixty-fourth Year of the Republic of India as follows:—

CHAPTER I

Preliminary

1. Short title and commencement. - 1 This Act may be called the Criminal Law Amendment Act, 2013.

2 It shall be deemed to have come into force on the 3rd day of February, 2013.

CHAPTER II

Amendments to the Indian Penal Code

2. Amendment of section 100.– In the Indian Penal Code 45 of 1860 hereafter in this Chapter referred to as the Penal Code, in section 100, after clause Sixthly, the following clause shall be inserted, namely:—–

"***Seventhly.***– An act of throwing or administering acid or an attempt to throw or administer acid which may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such act.".

3. Insertion of new sections 166A and 166B.– After section 166 of the Penal Code, the following sections shall be inserted, namely:—

"166A. Public servant disobeying direction under law. – Whoever, being a public servant,—–

a knowingly disobeys any direction of the law which prohibits him from requiring the attendance at any place of any person for the purpose of investigation into an offence or any other matter, or

b knowingly disobeys, to the prejudice of any person, any other direction of the law regulating the manner in which he shall conduct such investigation, or

c fails to record any information given to him under sub-section 1 of section 154 of the Code of Criminal Procedure, 1973 2 of 1974, in relation to cognizable offence punishable under section 326A, section

326B, section 354, section 354B, section 370, section 370A, section 376, section 376A, section 376B, section 376C, section 376D, section 376E or section 509, shall be punished with rigorous imprisonment for a term which shall not be less than six months but which may extend to two years, and shall also be liable to fine.

"166B. Punishment for non-treatment of victim.- Whoever, being in charge of a hospital, public or private, whether run by the Central Government, the State Government, local bodies or any other person, contravenes the provisions of section 357C of the Code of Criminal Procedure, 1973 2 of 1974, shall be punished with imprisonment for a term which may extend to one year or with fine or with both.".

4. Amendment of section 228A. – In section 228A of the Penal Code, in sub-section 1, for the words, figures and letters "offence under section 376, section 376A, section 376B, section 376C or section 376D", the words, figures and letters "offence under section 376, section 376A, section 376B, section 376C, section 376D or section 376E" shall be substituted.

5. Insertion of new sections 326A and 326B.– After section 326 of the Penal Code, the following sections shall be inserted, namely:—

'326A. Voluntarily causing grievous hurt by use of acid, etc. – Whoever causes permanent or partial damage or deformity to, or burns or maims or disfigures or disables, any part or parts of the body of a person or causes grievous hurt by throwing acid on or by administering acid to that person, or by using any other means with the intention of causing or with the knowledge that he is likely to cause such injury or hurt, shall be punished with imprisonment of either description for a term which shall not be less than ten years but which may extend to imprisonment for life, and with fine:

Provided that such fine shall be just and reasonable to meet the medical expenses of the treatment of the victim:

Provided further that any fine imposed under this section shall be paid to the victim.

326B. Voluntarily throwing or attempting to throw acid. – Whoever throws or attempts to throw acid on any person or attempts to administer acid to any person, or attempts to use any other means, with the intention of causing permanent or partial damage or deformity or burns or maiming or disfigurement or disability or grievous hurt to that person, shall be punished with imprisonment of either description for a term which shall not be less than five years but which may extend to seven years, and shall also be liable to fine.

Explanation 1.— For the purposes of section 326A and this section, "acid" includes any substance which has acidic or corrosive character or

burning nature, that is capable of causing bodily injury leading to scars or disfigurement or temporary or permanent disability.

Explanation 2.— For the purposes of section 326A and this section, permanent or partial damage or deformity shall not be required to be irreversible.'.

6. Amendment of section 354. – In section 354 of the Penal Code, for the words "shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both", the words "shall be punished with imprisonment of either description for a term which shall not be less than one year but which may extend to five years, and shall also be liable to fine" shall be substituted.

7. Insertion of new sections 354A, 354B, 354C and 354D.– After section 354 of the Penal Code, the following sections shall be inserted, namely:—

'354A. Sexual harassment and punishment for sexual harassment.-

1 A man committing any of the following acts—

i physical contact and advances involving unwelcome and explicit sexual overtures; or

ii a demand or request for sexual favours; or

iii showing pornography against the will of a woman; or

iv making sexually coloured remarks,

shall be guilty of the offence of sexual harassment.

2 Any man who commits the offence specified in clause i or clause ii or clause iii of sub-section 1 shall be punished with rigorous imprisonment for a term which may extend to three years, or with fine, or with both.

3 Any man who commits the offence specified in clause iv of sub-section 1 shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

354B. Assault or use of criminal force to woman with intent to disrobe.– Any man who assaults or uses criminal force to any woman or abets such act with the intention of disrobing or compelling her to be naked, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to seven years, and shall also be liable to fine.

354C. Voyeurism.– Any man who watches, or captures the image of a woman engaging in a private act in circumstances where she would usually have the expectation of not being observed either by the perpetrator or by any other person at the behest of the perpetrator or disseminates such image shall be punished on first conviction with imprisonment of either description for a term which shall not be less

than one year, but which may extend to three years, and shall also be liable to fine, and be punished on a second or subsequent conviction, with imprisonment of either description for a term which shall not be less than three years, but which may extend to seven years, and shall also be liable to fine.

Explanation 1.— For the purpose of this section, "private act" includes an act of watching carried out in a place which, in the circumstances, would reasonably be expected to provide privacy and where the victim's genitals, posterior or breasts are exposed or covered only in underwear; or the victim is using a lavatory; or the victim is doing a sexual act that is not of a kind ordinarily done in public.

Explanation 2.— Where the victim consents to the capture of the images or any act, but not to their dissemination to third persons and where such image or act is disseminated, such dissemination shall be considered an offence under this section.

354D. Stalking.- 1 Any man who-

i follows a woman and contacts, or attempts to contact such woman to foster personal interaction repeatedly despite a clear indication of disinterest by such woman; or

ii monitors the use by a woman of the internet, email or any other form of electronic communication, commits the offence of stalking:

Provided that such conduct shall not amount to stalking if the man who pursued it proves that—

i it was pursued for the purpose of preventing or detecting crime and the man accused of stalking had been entrusted with the responsibility of prevention and detection of crime by the State; or

ii it was pursued under any law or to comply with any condition or requirement imposed by any person under any law; or

iii in the particular circumstances such conduct was reasonable and justified.

2 Whoever commits the offence of stalking shall be punished on first conviction with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine; and be punished on a second or subsequent conviction, with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.'

8. Substitution of new sections 370 and 370 A for section 370.– For section 370 of the Penal Code, the following sections shall be substituted, namely:—

‘370. Trafficking of person. – 1 Whoever, for the purpose of exploitation, a recruits, b transports, c harbours, d transfers, or e receives, a person or persons, by—

First.— using threats, or

Secondly.— using force, or any other form of coercion, or

Thirdly.— by abduction, or

Fourthly.— by practising fraud, or deception, or

Fifthly.— by abuse of power, or

Sixthly.— by inducement, including the giving or receiving of payments or benefits, in order to achieve the consent of any person having control over the person recruited, transported, harboured, transferred or received,

commits the offence of trafficking.

Explanation 1.— The expression “exploitation” shall include any act of physical exploitation or any form of sexual exploitation, slavery or practices similar to slavery, servitude, or the forced removal of organs.

Explanation 2.— The consent of the victim is immaterial in determination of the offence of trafficking.

2 Whoever commits the offence of trafficking shall be punished with rigorous imprisonment for a term which shall not be less than seven years, but which may extend to ten years, and shall also be liable to fine.

3 Where the offence involves the trafficking of more than one person, it shall be punishable with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life, and shall also be liable to fine.

4 Where the offence involves the trafficking of a minor, it shall be punishable with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine.

5 Where the offence involves the trafficking of more than one minor, it shall be punishable with rigorous imprisonment for a term which shall not be less than fourteen years, but which may extend to imprisonment for life, and shall also be liable to fine.

6 If a person is convicted of the offence of trafficking of minor on more than one occasion, then such person shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person’s natural life, and shall also be liable to fine.

7 When a public servant or a police officer is involved in the trafficking of any person then, such public servant or police officer shall be

punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.

370A. Exploitation of a trafficked person.– 1 Whoever, knowingly or having reason to believe that a minor has been trafficked, engages such minor for sexual exploitation in any manner, shall be punished with rigorous imprisonment for a term which shall not be less than five years, but which may extend to seven years, and shall also be liable to fine.

2 Whoever, knowingly by or having reason to believe that a person has been trafficked, engages such person for sexual exploitation in any manner, shall be punished with rigorous imprisonment for a term which shall not be less than three years, but which may extend to five years, and shall also be liable to fine.'.

9. Substitution of new sections for sections 375, 376, 376A, 376B, 376C and 376D.– For sections 375, 376, 376A, 376B, 376C and 376D of the Penal Code, the following sections shall be substituted, namely:—

'375. Rape.– A man is said to commit "rape" if he—

a penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

b inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

c manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

d applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:—

First.– Against her will.

Secondly. –Without her consent.

Thirdly. – With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly. –With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly. – With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly. –With or without her consent, when she is under eighteen years of age.

Seventhly. – When she is unable to communicate consent.

Explanation 1.— For the purposes of this section, "vagina" shall also include *labia majora*.

Explanation 2.— Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1.— A medical procedure or intervention shall not constitute rape.

Exception 2.— Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.

376. Punishment for rape. – 1 Whoever, except in the cases provided for in sub-section 2, commits rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than seven years, but which may extend to imprisonment for life, and shall also be liable to fine.

2 Whoever,—

a being a police officer, commits rape—

i within the limits of the police station to which such police officer is appointed; or

ii in the premises of any station house; or

iii on a woman in such police officer's custody or in the custody of a police officer subordinate to such police officer; or

b being a public servant, commits rape on a woman in such public servant's custody or in the custody of a public servant subordinate to such public servant; or

c being a member of the armed forces deployed in an area by the Central or a State Government commits rape in such area; or

d being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time

being in force or of a women's or children's institution, commits rape on any inmate of such jail, remand home, place or institution; or

e being on the management or on the staff of a hospital, commits rape on a woman in that hospital; or

f being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman; or

g commits rape during communal or sectarian violence; or

h commits rape on a woman knowing her to be pregnant; or

i commits rape on a woman when she is under sixteen years of age;

j commits rape, on a woman incapable of giving consent; or

k being in a position of control or dominance over a woman, commits rape on such woman; or

l commits rape on a woman suffering from mental or physical disability; or

m while committing rape causes grievous bodily harm or maims or disfigures or endangers the life of a woman; or

n commits rape repeatedly on the same woman, shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.

Explanation.— For the purposes of this sub-section,—

a "armed forces" means the naval, military and air forces and includes any member of the Armed Forces constituted under any law for the time being in force, including the paramilitary forces and any auxiliary forces that are under the control of the Central Government or the State Government;

b "hospital" means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation;

c "police officer" shall have the same meaning as assigned to the expression "police" under the Police Act, 1861 5 of 1861;

d "women's or children's institution" means an institution, whether called an orphanage or a home for neglected women or children or a widow's home or an institution called by any other name, which is established and maintained for the reception and care of women or children.

376A. Punishment for causing death or resulting in persistent vegetative state of victim. – Whoever, commits an offence punishable under sub-section 1 or sub-section 2 of section 376 and in the course of such commission inflicts an injury which causes the death of the woman or causes the woman to be in a persistent vegetative state, shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, or with death.

376B. Sexual intercourse by husband upon his wife during separation.– Whoever has sexual intercourse with his own wife, who is living separately, whether under a decree of separation or otherwise, without her consent, shall be punished with imprisonment of either description for a term which shall not be less than two years but which may extend to seven years, and shall also be liable to fine.

Explanation.— In this section, "sexual intercourse" shall mean any of the acts mentioned in clauses a to d of section 375.

376C. Sexual intercourse by a person in authority.– Whoever, being—

a in a position of authority or in a fiduciary relationship; or

b a public servant; or

c superintendent or manager of a jail, remand home or other place of custody established by or under any law for the time being in force, or a women's or children's institution; or

d on the management of a hospital or being on the staff of a hospital, abuses such position or fiduciary relationship to induce or seduce any woman either in his custody or under his charge or present in the premises to have sexual intercourse with him, such sexual intercourse not amounting to the offence of rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than five years, but which may extend to ten years, and shall also be liable to fine.

Explanation 1.—In this section, "sexual intercourse" shall mean any of the acts mentioned in clauses a to d of section 375.

Explanation 2. — For the purposes of this section, Explanation 1 to section 375 shall also be applicable.

Explanation 3.— ''Superintendent", in relation to a jail, remand home or other place of custody or a women's or children's institution, includes a person holding any other office in such jail, remand home, place or institution by virtue of which such person can exercise any authority or control over its inmates.

Explanation 4.— The expressions "hospital" and "women's or children's institution" shall respectively have the same meaning as in Explanation to sub-section 2 of section 376.

376D. Gang rape.— Where a woman is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to life which shall mean imprisonment for the remainder of that person's natural life, and with fine:

Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:

Provided further that any fine imposed under this section shall be paid to the victim.

376E. Punishment for repeat offenders.– Whoever has been previously convicted of an offence punishable under section 376 or section 376A or section 376D and is subsequently convicted of an offence punishable under any of the said sections shall be punished with imprisonment for life which shall mean imprisonment for the remainder of that person's natural life, or with death.'.

10. Amendment of section 509.– In section 509 of the Penal Code, for the words "shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both", the words "shall be punished with simple imprisonment for a term which may extend to three years, and also with fine" shall be substituted.

CHAPTER III

Amendments to the Code of Criminal Procedure, 1973

11. Amendment of section 26.- In the Code of Criminal Procedure, 1973 2 of 1974 hereafter in this Chapter referred to as the Code of Criminal Procedure, in section 26, in the proviso to clause a, for the words, figures and letters "offence under section 376 and sections 376A to 376D of the Indian Penal Code 45 of 1860", the words, figures and letters "offence under section 376, section 376A, section 376B, section 376C, section 376D or section 376E of the Indian Penal Code 45 of 1860" shall be substituted.

12. Amendment of section 54A.– In section 54A of the Code of Criminal Procedure, the following provisos shall be inserted, namely:—

"Provided that, if the person identifying the person arrested is mentally or physically disabled, such process of identification shall take place under the supervision of a Judicial Magistrate who shall take appropriate steps to ensure that such person identifies the person arrested using methods that person is comfortable with:

Provided further that if the person identifying the person arrested is mentally or physically disabled, the identification process shall be videographed.".

13. Amendment of section 154. – In section 154 of the Code of Criminal Procedure, in sub-section 1, the following provisos shall be inserted, namely:—

"Provided that if the information is given by the woman against whom an offence under section 326A, section 326B, section 354, section 354A, section 354B, section 354C, section 354D, section 376, section 376A, section 376B, section 376C, section 376D, section 376E or section 509 of the Indian Penal Code 45 of 1860 is alleged to have been committed or attempted, then such information shall be recorded, by a woman police officer or any woman officer:

Provided further that—

a in the event that the person against whom an offence under section 354, section 354A, section 354B, section 354C, section 354D, section 376, section 376A, section 376B, section 376C, section 376D, section 376E or section 509 of the Indian Penal Code 45 of 1860 is alleged to have been committed or attempted, is temporarily or permanently mentally or physically disabled, then such information shall be recorded by a police officer, at the residence of the person seeking to report such offence or at a convenient place of such person's choice, in the presence of an interpreter or a special educator, as the case may be;

b the recording of such information shall be videographed;

c the police officer shall get the statement of the person recorded by a Judicial Magistrate under clause a of sub-section 5A of section 164 as soon as possible."

14. Amendment of section 160. – In section 160 of the Code of Criminal Procedure, in sub-section 1, in the proviso, for the words "under the age of fifteen years or woman", the words "under the age of fifteen years or above the age of sixty-five years or a woman or a mentally or physically disabled person" shall be substituted.

15. Amendment of section 161.- In section 161 of the Code of Criminal Procedure, in sub-section 3, after the proviso, the following proviso shall be inserted, namely:—

"Provided further that the statement of a woman against whom an offence under section 354, section 354A, section 354B, section 354C, section 354D, section 376, section 376A, section 376B, section 376C, section 376D, section 376E or section 509 of the Indian Penal Code 45 of 1860 is alleged to have been committed or attempted shall be recorded, by a woman police officer or any woman officer.".

16. Amendment of section 164. – In section 164 of the Code of Criminal Procedure, after sub-section 5, the following sub-section shall be inserted, namely:—

"5A a In cases punishable under section 354, section 354A, section 354B, section 354C, section 354D, sub-section 1 or sub-section 2 of section 376, section 376A, section 376B, section 376C, section 376D, section 376E or section 509 of the Indian Penal Code 45 of 1860 , the Judicial Magistrate shall record the statement of the person against whom such offence has been committed in the manner prescribed in sub-section 5, as soon as the commission of the offence is brought to the notice of the police:

Provided that if the person making the statement is temporarily or permanently mentally or physically disabled, the Magistrate shall take the assistance of an interpreter or a special educator in recording the statement:

Provided further that if the person making the statement is temporarily or permanently mentally or physically disabled, the statement made by the person, with the assistance of an interpreter or a special educator, shall be videographed.

b A statement recorded under clause a of a person, who is temporarily or permanently mentally or physically disabled, shall be considered a statement in lieu of examination-in-chief, as specified in section 137 of the Indian Evidence Act, 1872 1 of 1872 such that the maker of the statement can be cross-examined on such statement, without the need for recording the same at the time of trial.".

17. Amendment of section 173. – In section 173 of the Code of Criminal Procedure, in sub-section 2, in sub-clause h of clause i, for the words, figures and letters "or 376D of the Indian Penal Code 45 of 1860", the words, figures and letters " 376D or section 376E of the Indian Penal Code" shall be substituted.

18. Amendment of section 197.– In section 197 of the Code of Criminal Procedure, after sub-section 1, the following Explanation shall be inserted, namely:—

"Explanation.— For the removal of doubts it is hereby declared that no sanction shall be required in case of a public servant accused of any offence alleged to have been committed under section 166A, section 166B, section 354, section 354A, section 354B, section 354C, section 354D, section 370, section 375, section 376, section 376A, section 376C, section 376D or section 509 of the Indian Penal Code 45 of 1860.".

19. Insertion of new section 198B.– After section 198A of the Code of Criminal Procedure, the following section shall be inserted, namely:—

"198B. Cognizance of offence. – No Court shall take cognizance of an offence punishable under section 376B of the Indian Penal Code where the persons are in a marital relationship, except upon prima facie satisfaction of the facts which constitute the offence upon a complaint having been filed or made by the wife against the husband.".

20. Amendment of section 273. – In section 273 of the Code of Criminal Procedure, before the Explanation, the following proviso shall be inserted, namely:—

"Provided that where the evidence of a woman below the age of eighteen years who is alleged to have been subjected to rape or any other sexual offence, is to be recorded, the court may take appropriate measures to ensure that such woman is not confronted by the accused while at the same time ensuring the right of cross-examination of the accused.".

21. Amendment of section 309.– In section 309 of the Code of Criminal Procedure, for sub-section 1, the following sub-section shall be substituted, namely:—

"1 In every inquiry or trial the proceedings shall be continued from day-to-day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded:

Provided that when the inquiry or trial relates to an offence under section 376, section 376A, section 376B, section 376C or section 376D of the Indian Penal Code 45 of 1860, the inquiry or trial shall, as far as possible be completed within a period of two months from the date of filing of the charge sheet.".

22. Amendment of section 327.– In section 327 of the Code of Criminal Procedure, in sub-section 2, for the words, figures and letter "or section 376D of the Indian Penal Code 45 of 1860", the words, figures and letters "section 376D or section 376E of the Indian Penal Code 45 of 1860" shall be substituted.

23. Insertion of new sections 357B and 357C.- After section 357A of the Code of Criminal Procedure, the following sections shall be inserted, namely:—

"357B. Compensation to be in addition to fine under section 326A or section 376D of Indian Penal Code.– The compensation payable by the State Government under section 357A shall be in addition to the payment of fine to the victim under section 326A or section 376D of the Indian Penal Code 45 of 1860.

357C. Treatment of victims. – All hospitals, public or private, whether run by the Central Government, the State Government, local bodies or any other person, shall immediately, provide the first-aid or medical treatment, free of cost, to the victims of any offence covered under section 326A, 376, 376A, 376B, 376C, 376D or section 376E of the

Indian Penal Code 45 of 1860, and shall immediately inform the police of such incident.".

24. Amendment of First Schedule. – In the First Schedule to the Code of Criminal Procedure, under the heading "I.-OFFENCES UNDER THE INDIAN PENAL CODE",—

a after the entries relating to section 166, the following entries shall be inserted, namely :–

1	2	3	4	5	6
"166A	Public servant disobeying direction under law.	Imprisonment for minimum 6 months which may extend to 2 years and fine.	Cognizable	Bailable	Magistrate of the first class.
166B	Non-treatment of victim by hospital	Imprisonment for 1 year or fine or both	Non-Cognizable	Bailable	Magistrate of the first class.'';

b after the entries relating to section 326, the following entries shall be inserted, namely:—

1	2	3	4	5	6
"326A	Voluntarily causing grievous hurt by use of acid, etc.	Imprisonment for not less than 10 years but which may extend to imprisonment for life and fine to be paid to the victim.	Cognizable	Non-bailable	Court of Session
326B	Voluntarily throwing or attempting to throw acid.	Imprisonment for 5 years but which may extend to 7 years and with fine.	Cognizable	Non-bailable	Court of Session.";

c for the entries relating to section 354, the following entries shall be substituted, namely:—

1	2	3	4	5	6
"354	Assault or use of criminal force to woman with intent to outrage her modesty.	Imprisonment of 1 year which may extend to 5 years, and with fine.	Cognizable	Non-bailable	Any Magistrate.
354A	Sexual harassment of the nature of unwelcome physical contact and advances or a demand or request for sexual favours, showing pornography.	Imprisonment which may extend to 3 years or with fine or with both.	Cognizable	bailable	Any Magistrate.

1	2	3	4	5	6
	Sexual harassment of the nature of making sexually coloured remark.	Imprisonment which may extend to 1 year or with fine or with both.	Cognizable	Bailable	Any Magistrate.
354B	Assault or use of criminal force to woman with intent to disrobe.	Imprisonment of not less than 3 years but which may extend to 7 years and with fine.	Cognizable	Non-bailable	Any Magistrate.
354C	Voyeurism.	Imprisonment of not less than 3 year but which may extend to 3 years and with fine for first conviction.	Cognizable	Bailable	Any Magistrate.
		Imprisonment of not less than 1 years but which may extend to 7 years and with fine for second or subsequent conviction.	Cognizable	Non-bailable	Any Magistrate.
354D	Stalking.	Imprisonment up to 3 years and with fine for first conviction.	Cognizable	Bailable	Any Magistrate.
		Imprisonment up to 5 years and with fine for Second or subsequent conviction.	Cognizable	Non-bailable	Any Magistrate.”;

d for the entries relating to section 370, the following entries shall be substituted, namely:—

1	2	3	4	5	6
“370	Trafficking of person.	Imprisonment of not less than 7 years but which may extend to 10 years and with fine.	Cognizable	Non-bailable	Court of Session.
	Trafficking of more than one person.	Imprisonment of not less than 10 years but which may extend to imprisonment for life and with fine.	Cognizable	Non-bailable	Court of Session.
	Trafficking of a minor.	Imprisonment of not less than 10 years but which may extend to imprisonment for life and with fine.	Cognizable	Non-bailable	Court of Session.

1	2	3	4	5	6
	Trafficking of more than one minor.	Imprisonment of not less than 14 years but which may extend to imprisonment for life and with fine.	Cognizable	Non-bailable	Court of Session>
	Person convicted of offence of trafficking of minor on more than one occasion.	Imprisonment for life which shall mean the remainder of that person's natural life and with fine.	Cognizable	Non-bailable	Court of Session>
	Public servant or a police officer involved in trafficking of minor.	Imprisonment for life which shall mean the remainder of that person's natural life and with fine.	Cognizable	Non-bailable	Court of Session>
370A	Exploitation of a trafficked child.	Imprisonment of not less than 5 years but which may extend to 7 years and with fine.	Cognizable	Non-bailable	Court of Session
	Exploitation of a trafficked person.	Imprisonment of not less than 3 years but which may extend to 5 years and with fine.	Cognizable	Non-bailable	Court of Session.”;

e for the entries relating to sections 376, 376A, 376B, 376C and 376D, the following entries shall be substituted, namely:—

1	2	3	4	5	6
“376	Rape	Rigorous imprisonment of not less than 7 years but which may extend to imprisonment for life and with fine.	Cognizable	Non-bailable	Court of Session>
	Rape by a police officer or a public servant or member of armed forces or a person being on the management or on the staff of a jail, remand home or other place of custody or women's or children's institution or by a person on the management or on the staff of a hospital, and rape	Rigorous imprisonment of not less than 10 years but which may extend to imprisonment for life which shall mean the remainder of that person's natural life and with fine.	Cognizable	Non-bailable	Court of Session.

1	2	3	4	5	6
	committed by person in a position of trust or authority towards the person raped or by a near relative of the person raped.				
376A	Person committing an offence of rape and inflicting injury which causes death or causes the woman to be in a persistent vegetative state.	Rigorous imprisonment of not less than 20 years but which may extend to imprisonment for life which shall mean imprisonment for the remainder of that person's natural life or with death.	Cognizable	Non-bailable	Court of Session.
376B	Sexual intercourse by husband upon his wife during separation.	Imprisonment for not less than 2 years but which may extend to 7 years and with fine.	Cognizable but only on the complaint of the victim	Bailable	Court of Session.
376C	Sexual intercourse by a person in authority.	Rigorous imprisonment for not less than 5 years but which may extend to 10 years and with fine.	Cognizable	Non-bailable	Court of Session.
376D	Gang rape.	Rigorous imprisonment for not less than 20 years but which may extend to imprisonment for life which shall mean imprisonment for the remainder of that person's natural life and with fine to be paid to the victim.	Cognizable	Non-bailable	Court of Session.
376E	Repeat offenders.	Imprisonment for life which shall mean imprisonment for the remainder of that person's natural life or with death.	Cognizable	Non-bailable	Court of Session.";

f in entry relating to section 509, in column 3, for the words "Simple imprisonment for one year, or fine, or both,", the words and figure "Simple imprisonment for 3 years and with fine" shall be substituted.

CHAPTER IV

Amendments to the Indian Evidence Act, 1872

25. Insertion of new section 53A.– After section 53 of the Indian Evidence Act, 1872 hereafter in this Chapter referred to as the Evidence Act, the following section shall be inserted, namely:—

"53A. Evidence of character or previous sexual experience not relevant in certain cases.– In a prosecution for an offence under section 354, section 354A, section 354B, section 354C, section 354D, section 376, section 376A, section 376B, section 376C, section 376D or section 376E of the Indian Penal Code 45 of 1860 or for attempt to commit any such offence, where the question of consent is in issue, evidence of the character of the victim or of such person's previous sexual experience with any person shall not be relevant on the issue of such consent or the quality of consent.".

26. Substitution of new section for section 114A.– For section 114A of the Evidence Act, the following section shall be substituted, namely:—

'114A. Presumption as to absence of consent in certain prosecution for rape.– In a prosecution for rape under clause a, clause b, clause c, clause d, clause e, clause f, clause g, clause h, clause i, clause j, clause k, clause l, clause m or clause n of sub-section 2 of section 376 of the Indian Penal Code 45 of 1860, where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and such woman states in her evidence before the court that she did not consent, the court shall presume that she did not consent.

Explanation.— In this section, "sexual intercourse" shall mean any of the acts mentioned in clauses a to d of section 375 of the Indian Penal Code 45 of 1860:

27. Substitution of new section for section 119.– For section 119 of the Evidence Act, the following section shall be substituted, namely:—

"**119. Witness unable to communicate verbally.–** A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written and the signs made in open Court, evidence so given shall be deemed to be oral evidence:

Provided that if the witness is unable to communicate verbally, the Court shall take the assistance of an interpreter or a special educator in recording the statement, and such statement shall be videographed.".

28. Amendment of section 146.– In section 146 of the Evidence Act, for the proviso, the following proviso shall be substituted, namely:—

"Provided that in a prosecution for an offence under section 376, section 376A, section 376B, section 376C, section 376D or section 376E of the Indian Penal Code 45 of 1860 or for attempt to commit any such offence, where the question of consent is an issue, it shall not be permissible to adduce evidence or to put questions in the cross-examination of the victim as to the general immoral character, or previous sexual experience, of such victim with any person for proving such consent or the quality of consent.".

CHAPTER V

Amendment to the Protection of Children from Sexual Offences Act, 2012

29. Substitution of new sections for section 42.– For section 42 of the Proteciton of Children from Sexual Offences Act, 2012 (32 of 2012, the following sections shall be substituted, namely:—

"42. Alternate punishment.– Where an act or omission constitutes an offence punishable under this Act and also under sections 166A, 354A, 354B, 354C, 354D, 370, 370A, 375, 376, 376A, 376C, 376D, 376E or seciton 509 of the Indian Penal Code 45 of 1860, then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment under this Act or under the Indian Penal Code as provides for punishment which is greater in degree.

42A. Act not in derogation of any other law.– The provisions of this Act shall be in additon to and not in derogation of the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of this Act shall have overriding effect on the provisions of any such law to the extent of the inconsistency.".

CHAPTER VI

Miscellaneous

30. Repeal and savings–. 1 The Criminal Law Amendment Ordinance, 2013 Ord. 3 of 2013 is hereby repealed.

2 Notwithstanding such repeal, anything done or any action taken under the Indian Penal Code 45 of 1860, the Code of Criminal Procedure, 1973 2 of 1974 and the Indian Evidence Act, 1872 1 of 1872, as amended by the said Ordinance, shall be deemed to have been done or taken under the corresponding provisions of those Acts, as amended by this Act.

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